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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM H. ALSUP

ORACLE AMERICA, INC.,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	No. CV 10-3561 WHA
	)	
GOOGLE, INC.,	)	
	)	
	)	San Francisco, California
Defendant.	)	Wednesday
	)	April 27, 2016

TRANSCRIPT OF PROCEEDINGS

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(Appearances continued on next page)

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Wednesday - April 27, 2016 **8:00 a.m.**

P R O C E E D I N G S

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THE CLERK: Calling CV 10-3561, Oracle America, Inc. vs. Google, Inc.

Counsel, please step forward to the podium and state your appearances.

MR. BICKS: Good morning, Your Honor. Peter Bicks from Orrick for Oracle. And you know Ms. Hurst.

MS. HURST: Good morning, Your Honor.

MR. BICKS: Andrew Silverman the Court has not met. Gabe Ramsey, and Trudy Harris does courtroom technology. She's over here. And Lisa Simpson you know.

MS. SIMPSON: Good morning, Your Honor.

THE COURT: All right. Thank you.

MR. VAN NEST: Good morning, Your Honor. Bob Van Nest for Google. I'm here with Christa Anderson, with Eugene Paige, with Michael Kwun, with Reid Mullen, Maya Karwande, and also with us Bruce Baber from King & Spalding as part of our Google of team.

THE COURT: Welcome back.

MR. COOPER: Good morning, Your Honor. John Cooper on behalf of Dr. Kearl, and Dr. Kearl is in the courtroom.

THE COURT: Again, thanks to both of you for being present.

We are here for final pretrial conference. I want to go over some procedural things, and, time permitting, we will go into some of the motions in limine, but as I said before, some of these motions in limine will have to be decided on the papers because you all have bombarded the Court with so much paper that it's impossible to responsively go through it in the time you have given me.

We will start with something easy.

Did you have something you wanted to raise?

MR. BICKS: No, Your Honor.

THE COURT: Okay. You can stand there for a moment. I'm handing down to Mr. Bicks -- thank you for your timeline. I have given you the -- I'm going to hand it down, but let me hold it up. This is kind of what I have in mind, something that looks like that, and you can -- don't feel obligated to use my version, but I tried to make it simpler, so you can go use that as a starting point and come up with a timeline that -- we'll have it up in the courtroom so the jury can always refer to it, and I will probably also hand it out as a single sheet of paper so the jury can have it in their steno pad. All right.

MR. BICKS: Yes.

THE COURT: All right. So enough on the timeline.

I need your witness list that I can put on the back of the questionnaire. Do you have that ready for me?

MR. BICKS: Yes, we do, Your Honor.

THE COURT: All right. Hand that up, please.

Mr. Van Nest, have you seen this?

MR. VAN NEST: Yes, I have, Your Honor.

THE COURT: So these are not lawyers. These are witnesses; right?

MR. BICKS: Yes.

THE COURT: Okay. That's great. Thank you. All right. How about the one-page statement to read to the jury?

MR. BICKS: That, Your Honor, we've been working on and I think we've made good progress. There are two basic issues, if I could just quickly bring them to Your Honor's attention, that we're debating. If we got quick guidance from you, I'm sure we could sort it out.

Issue one is whether or not in the neutral statement there would be reference to the damage claim in the case and whether or not we can say that we have a damage claim for billions of dollars. That's the question one.

And then question two is whether or not we can refer to the fact that Oracle has a claim for willfulness. Those are the two issues that we've been debating. I think if we get guidance from you, then we put the neutral statement to bed.

Our position obviously is that, you know, the amount of the damage claim is something that we think the jury in the venire should know about because I think people would naturally

have strong feelings one way or another, and it's something I think we should get out on the table, subject to a point I know the Court made about not conditioning. We are not trying to do that, but it is a fact that that's what we're claiming. And so that's -- that's where we are on those two issues.

THE COURT: All right. What's wrong with telling the jury up front that billions of dollars are being sought?

MR. VAN NEST: I just don't think that is appropriate for the neutral statement. We're just basically laying out that it's an infringement case, that there is a fair use defense, that Oracle has a claim that both parties are disputing the claim and the defense, period. If he wants to explore the damages in his 40-minute *voir dire*, I don't have any problem with that. If Your Honor wants to explore it in your *voir dire*, I don't have any problem with that. But I think this is a neutral statement that doesn't need to include that information and shouldn't. It should just be *Here are the claims. They're disputed. This is generally what the case is about.*

That's the same objection I have to willfulness which is it's sort of a detail that is not going to be involved until Phase Two, if we get there. Other than that, the parties have pretty much worked out the language of this thing.

THE COURT: Well, we should tell the jury in the opening statement what the dollar amount is so that if

someone -- there will be people in the venire who will be so offended by that number that they -- we will have to excuse them because they will be prejudiced against Oracle. There are people like that. And so we need to give them some clue as to what the number being sought is so that they can self-select out and that -- so you can either put in the actual number or you can put in -- just say billions of dollars. Whatever --

MR. VAN NEST: Very well.

THE COURT: Can you two at least agree on that?

MR. BICKS: Yes.

MR. VAN NEST: We will.

THE COURT: Now, on willfulness, remind me how willfulness plays into the case again.

MR. VAN NEST: Willfulness doesn't come into play unless they elect statutory damages, and they've refused to make that election yet, so as Your Honor ruled, willfulness is part of Phase Two if we get there because it's relevant only to statutory damages.

THE COURT: And you have not tried to take any deduction for overhead and so forth; right?

MR. VAN NEST: Well, it's not just overhead. The willfulness would apply if we took a deduction for taxes, and we've elected not to do that. We've taken it out of play.

THE COURT: So it's only in play for statutory damages?

MR. BICKS: And it's also, Your Honor, relevant for purposes of the injunction.

THE COURT: Well, I know, but that's something that I could decide on my own without a jury finding, but for that purpose, however, yes, it is relevant for that.

I think that one ought to be left out. I'll tell you why. Oracle is playing games with the statutory thing anyway. You know that. You're not going to ask for statutory damages. So the idea that we're going to insinuate the word *willfulness* into the statement up front on the theory that downstream they're going to have to make that finding, it's -- yeah, they will have to make the finding, but it's not important enough to surface in the neutral statement. Leave willfulness out for the time being in your one-page statement.

MR. BICKS: Okay.

MR. VAN NEST: Your Honor, with that guidance, we'll get you the statement this afternoon.

THE COURT: Great. Thank you.

All right. Next we go to -- let's just do some practical things for a moment.

I know that you big law firms like notebook -- witness notebooks with exhibits, and we don't do that here. We do it the old-fashioned common-law way because the notebooks never have the exact right copy.

So there will be one paper exhibit that is in paper form

or photograph, whatever, per exhibit number, and it has to be marked, and that is the official thing. That should be shown to the witness. That means before the witness shows up, you've got to fish out the right exhibits, have them stacked up, ready to go, hand them to the witness one at a time or sometimes in groups.

If you don't do it that way, the following problem can arise. I've had it happen in trials. I had it in closing argument in a civil case. Right in the middle of the defense closing argument, it turned out that the lawyer had put up on the screen Exhibit 17. I even remember the number. Exhibit 17 had never been put into evidence. What had been put into evidence and marked was something different. And the lawyer screwed up and blamed it on a paralegal.

So I then had to admonish the jury, *Mr. So and So just showed you a document that was never in evidence. You have to disregard that.* Well, the defense lost and got hit with millions of dollars because they showed the bogus document to the jury in closing argument. I don't know what the real reason was, but that's what my theory is.

That should never have happened and why did it happen? Because the big, big firms wanted to have big, big notebooks, and those notebooks are never right. They leave off a document. The appendix is not right.

So, anyway, the rule is this. It's the common-law rule.

There will be a document. It will have the tag put on by the clerk, Exhibit 3. That's what's official. So when it's moved into evidence, that's what comes in. I don't care if you didn't look at it, it's your own problem if you don't look at it. You should have vetted it up front. But when Exhibit 3 comes in, you cannot later come to me and say, *Oh, we thought that was a different document. We thought they were talking about Exhibit 3 to the deposition. Oh, my God, we made a mistake.* No. It's too late. Whatever it was comes into evidence. So we want to make sure the witness on the stand is actually playing with the same deck of cards that the Court of Appeals is going to be playing with. So it has to be -- that's the way we do it.

Now, we come to the electronic part. Here I have to trust the lawyers to show the jury the electronic version on the screen of what the hard copy document is. And I have to trust the other side to jump up and say something if the wrong document gets shown.

So that's the way we do the documents. All right. Any heartburn over that?

MR. VAN NEST: No heartburn, but just a question, Your Honor. So I'm understanding that when we put a direct exam witness on, we can't give him a notebook with exhibits in it?

THE COURT: That is correct.

MR. VAN NEST: I'm just going to walk up one at a time with the exhibits?

THE COURT: That's correct.

MR. VAN NEST: Then we're responsible, of course, for making sure what we display is what's in the actual exhibit?

THE COURT: That is correct.

MR. VAN NEST: Now, on cross --

THE COURT: Same thing.

MR. VAN NEST: -- are we going to proceed the same way?

THE COURT: Yes.

MR. VAN NEST: No notebook for cross for the witness?

THE COURT: No. No. I promise you, your paralegals will goof it up. Then you'll blame the paralegals.

MR. VAN NEST: I have never had that experience, Your Honor, but I trust you have.

THE COURT: No. My paralegals were great. They never made a mistake --

MR. VAN NEST: Mine either.

THE COURT: -- when I was practicing, but you lawyers -- mine were better.

MR. VAN NEST: That I have to dispute, Your Honor.

THE COURT: I tell you, I won't trust your paralegals to do it right.

MR. VAN NEST: That I dispute.

THE COURT: Because then you will be throwing yourself on the mercy of the Court. So too bad, you're going to do it one at a time. It can be done. It works great. It's better for the jury to do things one at a time.

MR. VAN NEST: Fair enough.

THE COURT: Any heartburn over there?

MR. BICKS: No.

THE COURT: So now we go to deposition, use of depositions. I don't like it when the lawyers say, *In your deposition, didn't you say the light was red*? Raise your hand if you know why that's no good. Okay. Ms. Hurst raises her hand. She probably knows the answer.

MR. BICKS: Because they didn't say that at the deposition.

THE COURT: Well, the lawyer always embellishes it. The lawyer didn't ask the right question and wants to fix it up.

MR. BICKS: Yes.

THE COURT: So whenever -- so in fact instead of saying the light was red in the deposition, the question was *didn't you say that the officer said the light was red.* That's totally different. And yet the lawyer, knowing that that's inadmissible for hearsay, tries to fix it up and say to the witness, *Didn't you say the light was red in your deposition*?

So the way you have to do it is that whenever you think

it's time to impeach with a deposition or -- or even -- it could be for any purpose if it's a party witness, you just say, *Judge, I want to read page 32 of the witness' testimony, lines 1 to* 4. So I will pause about two seconds. The other side should already have this out. If I don't hear an objection, I will say *proceed*.

You should not, on the other side, say, *Oh*, scramble around and then you're running for the boxes and delaying. That's a delay tactic. You got to have that deposition ready to go. Have it so that you can say *objection* if you have an objection, because otherwise, if there's a delay, the advocate loses the benefit of showing that the witness said exactly the opposite in the deposition. And so what you do once you say -- you always got to say *question*.

Question: What color was the light?

Answer, the light was red.

And don't -- you don't then start -- you don't need to start saying, *You were under oath. You lied, didn't you*? No, you don't get to do that. That's just argument. We don't do that. I will explain that it was under oath. I will explain what the depositions are. So the jury will just start cataloging all the inconsistencies and -- all right. So that's the way you do depositions.

MR. BICKS: And then, Your Honor, as I read the way you like to do it, then the question at the end would be, *Do*

you stand by that testimony.

THE COURT: You can ask that question. Yes. I will allow that. You can ask that question. You can say, *All right, Mr. Witness, do you stand by the testimony you gave in that deposition or not?* What are they going to say, you know? Yeah. That's a good question. You can ask that if you want. You don't have to ask that, but you can.

MR. BICKS: Thank you.

THE COURT: All right.

Ms. Hurst, was that the reason you were going to offer?

MS. HURST: I could never have said it as well, Your Honor.

THE COURT: All right. Well, thank you.

Okay. Depositions. All right.

Here's another easy one. Sometimes during trials like this, the lawyers will jump up and say, *They can't do that because they didn't disclose that.* I have learned that I can't take -- the lawyers then get up and I'll say, *What do you mean they didn't disclose it*?

Well, in their Rule 26 they didn't disclose it.

So then we usually I just say, *Forget it, we're going forward.* But it may be we have a break. At the break, then I say, with the jury not present, show me the Rule 26 disclosures and then the lawyer says, *Well, it's back at my office.* Well, that doesn't do me any good. All these boxes, you've got to

have it there. Chapter and verse, you've got to cite it, show it to me so I don't have to take anybody's word for what was and was not disclosed.

So if you're going to get into a discovery -- what happened in discovery or Rule 26 disclosures, you have to have it here in the courtroom so that I can see who's telling me the truth.

Stipulations. I guess we're going to have a few. Not many, but some. So the stipulations get read to the jury. That's the only way they come in. You do not send a document into the jury room with your stipulations on it because that gives the stipulations more weight than the rest of the testimony, so we -- and the jury gets to hear it and absorb it so you got to read, and then after you read it, I will turn to the other side and say, *Do you so stipulate* and they say *yes* and so then I'll tell the jury that's evidence in the case.

How long do you want for your opening statements?

MR. BICKS: You know, I would love an hour ten minutes.

THE COURT: That's too much.

MR. BICKS: I thought I'd --

THE COURT: That's too much for an opening statement. For a closing argument that's not enough, but for opening statements, I think that's too much.

MR. BICKS: How about an hour?

MR. VAN NEST: Sixty minutes is what I had in mind. Actually I think that's what you said earlier in an order that made sense.

THE COURT: Did I say 60 minutes? All right. One hour. We will give you one hour.

MR. VAN NEST: I'm assuming that although we're a defendant, we'll open first in Phase One since we have the burden of proof.

THE COURT: I think I should instruct that the -- on this phase they do have the burden of proof, they do get to go first. Any objection?

MR. BICKS: Well, I understand -- I mean, this is an open issue that we had which I understand, for purposes of presentation of the evidence, that they put on their evidence first. But, for example, when it comes to *voir dire* and actually giving the opening statement, you know, I could see views one way or the other.

THE COURT: Let's do this. For *voir dire*, you should go first. But for -- because this is -- there are multiple parts to the case, but for the opening statement, are we going to limit the opening statements to just the fair use issue or are we going to -- we have to explain the overall -- I think you should get to go -- why don't you let Mr. Bicks go first on the opening statement.

MR. VAN NEST: Well, I think, Your Honor, that you

earlier said we would go first in Phase One, and I have assumed, since we have the burden of proof, that we would go first, we would open first. Obviously my understanding from last time is you can talk about the whole case, too. He can talk about damages, I can talk about damages. We're not limited in the opening for Phase One to just fair use. He can talk about damages and so on, but since I have the burden of proof and since the focus of Phase One is on fair use and damages will be discussed but not the real focus immediately for the jury, I ought to go first, and that's what I assumed --

THE COURT: Mr. Cooper wants to say something here.

MR. COOPER: Yes, Your Honor.

Dr. Kearl feels it's necessary for him to hear the opening statement for damages. So if the original opening statement is going to include both fair use and damages, Dr. Kearl would need to be here. If there is going to be a second opening statement that relates to only damages, then that would affect his schedule. He would be here for that.

MR. VAN NEST: What I assumed, Your Honor, there could be reference to it. If counsel wanted to spend a lot of time on it, he or she could, but I certainly didn't plan to spend a lot of time on it. My focus is going to be on fair use because that's what the jurors are going to be hearing evidence about. And certainly Dr. Kearl can read the transcript of the first opening if he does -- is not able to be here.

MR. BICKS: Again, I just, Your Honor, think it's fair for us, as the plaintiff, to be able to set the stage for the opening statement, and we are in this unusual procedural posture, but --

THE COURT: Look, I agree with that. I think the plaintiff gets to go first, even though you have the burden of proof, and we'll explain that. And then you will get to go first on the actual presentation of the evidence, and for closing argument on the first phase, you will get to go first in close since you have the burden of proof. But for the overall kick the case off and introduce the case to the jury, the plaintiff I think should have that privilege.

So you get to go first, Mr. Bicks.

Are you going to give the opening statement?

MR. BICKS: Yes, sir.

THE COURT: So you get to go first.

And now you raise an interesting point. I think we should tell the jury there will be too phases, and if you want to address damages, I think it's okay. But I think we should also have a -- before the second phase, we should have at least a short opening statement then to reorient the jury and tell them what they're about to hear, and it would be -- so maybe you have two shots at it in a sense, but -- so I wouldn't spend much time on damages in this opening, but I think it's fair to tell the jury how the overall case is going to get organized.

MR. BICKS: Yes.

THE COURT: If Dr. Kearl feels he has got to be here in person and can't pick it up from the transcripts, that's fine. I want to accommodate him, but my guess is it will be fine just to read the transcripts.

MR. BICKS: Just so Dr. Kearl knows, I don't intend to go into damages in any great detail, and I think the process that Your Honor had set forth was, you know, an hour opening and then I think you had indicated a half an hour for Phase Two, you know, to kind of set the stage on damages. So while I may just touch on it, I'm kind of following your lead.

THE COURT: All right. Okay.

Who will the corporate representatives be? Let's take another easy one. Will we have corporate representatives here?

MR. BICKS: Yes. I think for us it's going to be a gentleman by the name of Mr. Saab, S-A-A-B.

THE COURT: And --

MR. VAN NEST: And for Google, it will be Catherine Lacavera, Your Honor, who is here today and was our corporate representative in trial one as well.

THE COURT: What is her position?

MR. VAN NEST: She is the chief of IP litigation.

THE COURT: What is Mr. Saab's position?

MR. BICKS: He is -- he is a senior executive at Oracle. I can get you his exact title. He's not a lawyer. He

is an executive.

THE COURT: That's a different person than we had last time. Seems like we had a woman.

MR. BICKS: You had Ms. Katz.

THE COURT: That's who it was.

MR. BICKS: And she will be testifying in the case.

THE COURT: Experts. Let's have a discussion about experts. It's okay with me if you want to have the experts attend all of the trial, part of the trial, but I'm going to have a caveat on that.

What do you all think?

MR. BICKS: I was assuming, understanding how you had done it before, that experts would be allowed to attend and we had planned on that.

MR. VAN NEST: I assumed that as well, Your Honor.

MR. COOPER: Dr. Kearl would like to hear Dr. Jaffe's testimony, regardless of when it comes in, so we would like some advance notice as to when Dr. Jaffe is going to testify, if he is going to testify in the liability phase.

THE COURT: Whose witness is that?

MR. BICKS: He is our witness, Your Honor.

THE COURT: Would you then notify Mr. Cooper?

MR. BICKS: Absolutely.

MR. COOPER: And Dr. Kearl intends to be present during the damages trial. We would want some indication as to

how long that would be, and we would appreciate 24-hours' notice before it begins.

THE COURT: All right. We will do all of that.

MR. COOPER: Thank you.

THE COURT: So now here is a caveat that goes with it. The rule says, Rule 26, that you're limited to what's in your -- on direct examination -- I should be very clear. On direct examination by the proponent of the expert, you are lockstep limited to what's in your report. I just want to stop here and make sure you've got that. The report has got to have every opinion and every bases, and if you left something out, too bad. On objection, you can't get into it. Let's stop.

Does everyone understand that's what the rule says?

MR. VAN NEST: We do, Your Honor.

MR. BICKS: Yes.

THE COURT: If you two want to stipulate you want a *Wild West* trial by ambush and you don't want that to apply, I will let you do that.

MR. BICKS: I like that.

THE COURT: You like what?

MR. BICKS: Wild Wild West.

THE COURT: Wild West.

MR. VAN NEST: I like the traditional rule, Your Honor, stick to the reports.

THE COURT: So you won't stipulate?

MR. BICKS: No. I'm fine.

THE COURT: What?

MR. BICKS: We understood the rules.

THE COURT: All right. Okay. Now, here is the reason I bring that up. The fact that the witnesses get to sit in here and hear all this other testimony does not give them some kind of permission to enlarge on their direct exam. They're still stuck with what they said in their report.

MR. VAN NEST: Understood.

THE COURT: All right. But there is a way that it makes a difference. Because on cross-examination, the witnesses are not stuck with what's in their report. If you open the door to something that's not in the report, that's your problem, if you are the examiner. Do you understand that part?

MR. VAN NEST: I understood that, too.

THE COURT: Okay. So that's where seeing all the testimony may benefit the witness. The witness might say, *Well, Mr. Van Nest, I'm glad you asked that because just the other day I was in here and I heard so and so testify and that fills the missing link. The missing link is now filled, and thank you for giving me the opportunity to make that clarification.*

MR. VAN NEST: That is nonresponsive, Your Honor.

THE COURT: Then you would jump up and say, *That is*

not in the report and I would say, *Too bad, you opened the door on cross-examination.* Then within reason on redirect, if it is responsive to something that was directly asked on cross -- this is sometimes not easy to apply -- but then the original proponent might be able to go beyond the four corners of the report because the other side went beyond the four corners of the report. So that's the way the thing about experts can still make a difference if they stay in the courtroom and -- okay. Enough on that.

We have this jury electronic cart that will be in the jury room during deliberations. We have plenty of time on this, but before it goes in there, you need to know how it works and make sure it's loaded up properly. In the last trial, it was not loaded up properly, and the jury had problems with it. Not your trial. A criminal trial.

But you have got plenty of time. Just put on your list of things to do to learn how that jury electronics cart works.

All right. Back East, they have a rule on -- that's not as enforced out here, but I think we did it last time, that on cross-examination, nobody, including your own lawyer, can talk to a witness while they are on cross. Real cross is what I mean. Adverse examination. Even overnight. You can't talk about the substance of their testimony.

This is so that lawyers don't get in there and woodshed the witness and fix up the testimony. This would even apply to

Mr. Cooper and Dr. Kearl.

Everybody okay with that rule?

MR. BICKS: Yes.

MR. COOPER: Yes. We understand that, Your Honor.

MR. VAN NEST: Yes.

THE COURT: What?

MR. COOPER: We understand that.

THE COURT: That's the way -- that's the way we will do it, too. Good.

Here's a small thing. I would like to get each side's, say, top 20 documents, but agree on this. In other words, if you've already overlapped, then don't give me multiple copies. Just give me one notebook about -- even this is too big, but something like this size that would have the top 20 documents. If you can't fit it all in one, just give me the top 15 then. But I'm sure there's not -- every case comes down to a small number of documents.

Mr. Cooper might remember what the old saying in our district that Joe Alioto only needed two documents to win any case. So you don't know what they were. Raise your hand if you know what the two were.

Okay. What were they?

MR. PAIGE: The worst the document in the case and the Magna Carta.

THE COURT: That's it. Did I say that before to you?

MS. ANDERSON: Yes.

THE COURT: That's good. For those of you who didn't hear, one would be the worst document in your files and the other is the Magna Carta. You are supposed to laugh at this point.

You really only need one document, but 15 would be good.

Let's go to the jury selection. I think we are going to have about 60 to 70, so I'm going to try to squeeze them all in there on the left. In that front row, I'm going to have to have all that clear over there so this is only during jury selection, and everyone else is going to have to squeeze in over there, and I still may have to ask some of the troops to go somewhere else if we can't fit them all in on the left. Once we get a jury sworn, then everyone can resume your original seats.

I think we -- I've laid out what the plan is in this document. The only wrinkle is that I'm going to ask you to use the stand up -- thank and excuse on your three peremptories.

So, Mr. Bicks, you would stand up and say, ***Mrs. So and So, we thank and excuse you.*** So everyone will know who you excused. Same for both sides. All right?

MR. VAN NEST: That's fine, Your Honor.

THE COURT: Okay. Otherwise, I think I'm -- I don't need to make any clarifications, but do you all have any issues you want to bring up on the jury selection?

MR. BICKS: Yes. I have a question, Your Honor, which was we went back and forth on the question of the mini opening. Your Honor had proposed --

THE COURT: We don't need that anymore because we're going to use the one-page statement.

MR. BICKS: Okay.

THE COURT: Unless you want it.

MR. BICKS: I just thought -- I thought it was actually a good idea, only in the sense that to have the jurors hear a little bit more about the case before they fill out the questionnaire I think may give us more of kind of an informed --

THE COURT: See, the objection to doing that was that Mr. Van Nest -- I'll put words in his mouth, but he said that he is such a good advocate, that of course they're going to be strongly in favor of his side at the end of the mini opening. And that's a fair point, you know, because maybe -- because of the strength of the opening statement, the mini statements, that they would already be persuaded, and that would be okay, I guess, because -- so I think we need to just -- we need to measure that -- what we could do is this.

We bring them in. We give them the one-page statement. I'll read it to them, and then they fill out the questionnaire. As they come forward and get into the jury box, then we could give them another mini opening. I wouldn't want them, though,

to go back and change any of their answers.

MR. VAN NEST: I think it gets a little complicated, Your Honor. I understood that we were going to replace that with the neutral statement and get the jurors' reactions and save the openings for openings.

THE COURT: I think that's what we should do now. I have done the mini openings, and it has this advantage. It gets them engaged. We might have even done it in this case. It gets the jury venire engaged so they want to serve. They say, *These are pretty good lawyers. This would be a great case to be on.*

MR. VAN NEST: I don't think that really is a good enough reason, but I don't feel strongly if Your Honor wants to do it, but I think it should come later in the process, not before they do the questionnaire. That was my objection.

THE COURT: Let's leave off the mini openings.

MR. VAN NEST: That's fine, Your Honor.

MR. BICKS: The reason I was thinking about it, Your Honor, was the notion that when people -- the neutral statement is very, very short and pretty vanilla. The thinking I had was that people may not really realize that much about the case, and after there was a mini opening, a light bulb could go off and somebody could say, *Oh, now I do know about this case. I remember seeing this, this or that and that was* --

THE COURT: Possibly that will happen anyway through the -- I'm going to allow each side to have some -- what did I say? 45 minutes?

MR. BICKS: I think you said 40.

MR. VAN NEST: I think it was 50, Your Honor. No. You said 40. You said 40.

THE COURT: 40?

MR. VAN NEST: Yes. We started at an hour.

THE COURT: I reduced it down because I'm doing your questionnaire.

MR. VAN NEST: I assume -- will you do your standard *voir dire* as well?

THE COURT: Yes.

MR. VAN NEST: That's what I thought.

THE COURT: I'm going to do all of that.

MR. VAN NEST: Thank you. I think the rest of it is very clear. And we will thank and excuse jurors as we go.

THE COURT: All right. Anything more on jury selection?

MR. BICKS: Just as a matter of logistics, Your Honor, getting the questionnaires --

THE COURT: Here is the way it's going to work. You won't see any of these questionnaires unless they're called forward, and then they will stand right there and the person called forward and hand up his one copy of the questionnaire to

me. If it's got those strong views listed, then I send them back out there and you just have to take my word that it had strong views.

Then we call the next person. Let's say that person does not have strong views. So then they get -- then I will have one of my staff go make two copies, and each side will get a copy of that questionnaire. You will get the copies of the ones who actually get seated in the box. We are going to need two extra seats over there to get 16. We will put a stool over there and another -- it will be a temporary arrangement, but it will work.

So that's how you get a copy of the questionnaire.

MR. BICKS: Thank you. Got it.

THE COURT: What else on jury selection, I mean?

MR. BICKS: So in terms of just anticipated scheduling for that day, what's Your Honor's thinking in terms of --

THE COURT: Well, I think there is a good chance we will do the opening statements the same day. I doubt that we'll get to the first witness, though. So I wish you would have one ready to go just in case, but I suspect we will only get through the opening statements. So be ready on your opening statements.

Now, speaking of which, I think it's -- Google says they would like to bring in some big screen, and I just can't do it. I tell you why. This equipment has broken down in every trial,

just the equipment that we have. It starts out working, then one day the ELMO won't work or -- and there's -- so we have to do it the old-fashioned way until two hours -- I just don't want to add and complicate it by larding in yet another system that is going to be putting a strain on the electronics in the courtroom.

MR. VAN NEST: I think that was a joint request, Your Honor. I think we had agreed on courtroom technology and, it's really up to date and really up to speed, and I think it will eliminate any problems with older equipment if you've had those.

THE COURT: You're not even going to use the stuff that is in the jury box?

MR. VAN NEST: I think we would. I think we supplement that. I think it's a joint request --

THE COURT: I didn't understand. I thought it was your request.

MR. BICKS: No. It's joint, Your Honor.

THE COURT: Where would you put the screen? Where would it go?

MR. VAN NEST: I will leave that to the technical people, but I think the screen goes here and I think that maybe the -- they may supplement the screens in the jury box. I'm not even sure.

THE COURT: What? No. We're not going to put extra

screens in the jury box.

MR. VAN NEST: I will be honest with you, I haven't looked at the details of the request, but I know it's joint, and the main point is to get a bigger screen and bigger projector so the documents are easy to see. That's the main point.

THE COURT: Where would the projector go?

MR. VAN NEST: Mr. Kamber knows the answer to this.

MR. KAMBER: Matthias Kamber on behalf of Google.

I think the idea between and among the parties is to have a screen that can be pulled up with a projector as necessary. Most of the time, it can be put away in the corner, and it wouldn't be interfering with the courtroom, but to the extent that the parties would want or need a larger screen, we would put it up there.

THE COURT: You mean you get to a document and you say, *Wait a minute, Mr. Witness, I've got to put up the screen*, and you are scrambling around over there trying to get his screen put up and warming up the projector. That will never work.

MR. KAMBER: No. I don't envision that it would be done that way. You would have to know or think through your direct examination or cross-examination, have the setup ready and not be doing it on the fly, but the point being that it won't be in the way or in the courtroom for every single

witness, I believe.

THE COURT: You know that you're going to use documents like crazy. It's going to have to be in place at all times.

Look, the most I would consider -- and I don't even like this because I think it's going to crowd it -- is if you could find a way to put a projector there and a screen there and that's it, nothing else in the jury box -- the jury has already got screens. We ought to be using that system.

MS. HURST: We can do that, Your Honor, with a short throw projector. We can put it right on the end of the table there and the screen on that side of the courtroom and it will be a nice, big image using a short throw projector over there.

THE COURT: Does it correct for the keystone effect?

MS. HURST: It does, Your Honor.

THE COURT: We can at least try it, and test it out before the trial starts. The thing is, starting tomorrow, I have a criminal trial that will go through at least Wednesday. I hope it's over by Wednesday, but after court or at some other time, you can come in here and test out your equipment. But it's got to be integrated so that it doesn't interfere with the existing equipment because I need to be able to look at the screen myself now and then, and I want definitely -- I want the jury to use the equipment that's in the jury box, although you can -- they can look at the big screen, too.

MR. KAMBER: Understood, Your Honor. I think that's the idea.

THE COURT: You should know, while we're talking about documents, that the witness on the stand can draw circles, and I think it's -- I don't even know if it's various colors, but say they draw an orange circle around a keyword. That doesn't stay there forever. It vanishes soon. You have to make a request of the clerk to save it, and that takes about a minute. It's not worth it unless it's very important. So you can do it, but be sparing in how many times you ask for that because it's not easy. All right. Okay.

Anything more on courtroom equipment?

MR. BICKS: Just so we do what Your Honor wants, I remember -- I think I had read if there is a video or something of a deposition, that that won't be picked up by the court reporter, so it's helpful to actually have that be --

THE COURT: An excellent point. Many people think that the court reporter will take down everything that is heard in the courtroom. It's not true. The court reporter only gets the words spoken in the courtroom, but any audio recording or any video recording is just on a CD.

So you then have the problem okay, how will the Court of Appeals know what it was the jury saw because you're only going to show very select snippets from the deposition. Well, here is what you have to do. You have to give to the court clerk at

the end of the day or the next day a CD that has just the snippets that were shown and then you identify it on the record as saying *we've marked for identification*. It's not in evidence, but marked for identification the excerpts from the deposition of Jonathan Schwartz that were shown to the jury. Then I will ask the other side, *Do you vouch that's what's on there*, and they will probably say yes, and that will be there for the record.

But what's on the court reporter's record, it will just say *video played*. That's it.

Do you understand how that works?

MR. BICKS: Yes.

MR. KAMBER: Yes, Your Honor.

THE COURT: Okay. All right. Anything else on the subject of courtroom equipment?

MR. BICKS: No, Your Honor.

MR. KAMBER: I don't believe so, Your Honor.

THE COURT: Do I have to give my speech about how important it is for junior lawyers to examine witnesses?

MR. BICKS: No.

MR. VAN NEST: We understand, Your Honor.

THE COURT: All right. Good. Okay. Because I could ask Mr. Cooper to come forward and give the same speech.

MR. COOPER: Thank you, Your Honor. I would.

THE COURT: I know he believes in what I preach. So

good.

Now, the last time I told you about this, and most people think I'm crazy, for many reasons, but this is one which I get a lot of laughs about, but okay, I'll say it anyway.

When somebody's got the floor, you cannot create any disturbances, including hacking and coughing. If you've got to hack and cough, you go out in the hallway. If Mr. Bicks has got somebody on the ropes and your client is going down for the third time, too bad. You cannot start hacking and coughing and distracting the jury. It's an old trick.

MR. BICKS: That includes like --

THE COURT: You probably have been the victim of it in other courts, but you won't be the victim of it here. So you must be respectful of the other side's -- this is unlike those depositions where you get to yank the witness out and take him in the hallway and tell him *why did you say that*. No. You just have to sit there and suffer while your witness goes down for the third time because this is the moment of truth. This is where good cross-examination blows stories out of the water. I love to see it. And you don't get any relief from it. You just have to sit there and suffer. All right. Both sides. It's going to happen to both of you.

But you cannot, because it's a very good moment in the court when that moment of truth finally comes out -- then you cannot distract by shuffling papers and hacking and coughing.

All right. Same thing on your opening statements and the like. I know you'll be good about this.

All right. So are there any other procedural things I can go over with you before we get into the motions in limine?

MR. BICKS: I just tell the Court that we had agreed -- a couple things -- one, on the openings, you know, to exchange graphics on Sunday before we start and make sure we don't have any issues, and we reached an agreement to do that Sunday afternoon.

THE COURT: You were here the last time, but you were not here. So here's the way I like to work. You get here at 7:30, and for the next 30 minutes, I am delighted to help the lawyers as much as I can, but at 8:01, we bring the jury in and we start hearing evidence. So the idea of long-winded motions in limine is out. We've got 30 minutes to address any problems. I'm going to say in most cases we don't need the 30 minutes. Ten minutes is usually enough.

And the jury gets here at 7:45, so sometimes we start right at 7:45 because the lawyers run out of things to bring up. But out of caution, we have up to 30 minutes. And maybe even during the course of the trial during the day, we might take up an issue at a break.

But it is very important that we not waste the jury's time when they're here in the courthouse. So when they're here, the top priority is letting them hear the evidence and the opening

statements and doing their job subject only to the minimum number of rest breaks that everybody of course needs.

So sidebars and breaks for motions in limine are -- we don't do that, so that's why I have you here at 7:30, so we can sort that out before we start with the jury. Okay?

MR. VAN NEST: That's great, Your Honor.

MR. BICKS: Your Honor, should I provide you with a copy of the graphics for the opening?

THE COURT: You can, but I don't need them unless there is a dispute.

MR. BICKS: Understood.

THE COURT: All right.

MR. BICKS: The jurors are allowed to have notepads?

THE COURT: Yes. We are going to give them a steno pad and a pencil, if they need it. They don't get -- if somebody -- so far no one has ever asked to use a computer to take notes. I guess if somebody asked, I probably would let them do it, but they still, even in this day and age, just go with the steno pad.

MR. VAN NEST: Your Honor, I had a couple of questions along those lines, just procedural.

I think last time we gave the jurors notebooks, but the only thing we gave them other than some paper was as a witness testified, you'd bring in a picture on a page of that witness so that they would have some recollection after the two weeks

of testimony. In other words, you would show the picture to the other side --

THE COURT: Where would this picture come from?

MR. VAN NEST: It would be a picture that we take -- we take it of our witnesses; they take it of their witnesses. It's supposed to be a current picture of the witness that looks like him or her, and it goes in the notebook as they testify.

THE COURT: I tried that in a criminal trial. Was it a criminal trial? Yeah. No, no, no. It was an employment trial. And one of the lawyers photoshopped it and put -- so it's very high contrast on this person who was a perfectly nice-looking woman in real life, suddenly looked like the Wicked Witch of the East from the harsh shadows of this -- every wrinkle in her face showed, and it was done by Photoshop, so let's make sure -- again, I don't want there to be monkey business with the photos. I'm okay with the idea, but I don't like the idea of giving them a piece of paper. I think it's -- why don't we just --

MR. VAN NEST: Just give them the picture.

THE COURT: I'm not even sure we need to do that. Why not you just show the pictures at the end and so -- why do we need to give them anything?

MR. VAN NEST: The only thought I had was since we are going to be in here for a couple of weeks, being able to associate testimony with various witnesses is useful. And if

all they have is a notepad, they can take notes, but I think most people pick up a visual image a little better, and the idea is just to give them a picture on the piece of paper that goes in the notebook on any day that a witness has testified so both sides would do it and we would clear the pictures ahead of time so we don't have the problem Your Honor mentioned.

MR. BICKS: He must think his witnesses are a lot better looking than our witnesses.

MR. VAN NEST: Well, mine are going to go first so they will be a little more -- less proximate for jurors. I don't feel strongly, but it's commonly done now, and I think it's a good idea.

THE COURT: Well, what I think is commonly done is to have the photos so you can use them in the closing argument and say, *Remember Mr. So and So? He testified to X.* That I don't have any problem with, as long as it's not an objectionable photo in some way.

MR. VAN NEST: Fair enough.

THE COURT: I think with so many witnesses in this case, we would be giving the jury 40 or 50 pieces of paper with pictures on them, and I think it could turn into a mess. They would have all these loose pieces of paper, maybe with their notes falling out. I would prefer not to do that.

MR. VAN NEST: That's fine, Your Honor. I don't think there will be 40 witnesses, but that's fine.

Would we be allowed -- we are going to be playing some video depositions, I think both sides, and possibly some reading from the last trial. Would we be allowed to give a brief introduction to the videos, just, *This is Witness X. He or she is from Y company. Their job was Z and they're testifying about X*?

THE COURT: You mean --

MR. VAN NEST: Before the video is played.

THE COURT: Of course. Yes. You can do that.

MR. VAN NEST: Fair enough.

The other procedural question I had was we have our witness disclosure obligations and we're all set on those. Last time you also imposed, I think, a seven-witness rolling disclosure requirement that was on top of our exchanging witnesses, and the way it worked was we gave you and the other side a list of our next seven witnesses, and you didn't have to do them in exactly that order, but you couldn't bring somebody in outside that, and you imposed that, I think, on top of the standard disclosure. Do you want to do that again?

THE COURT: What do you want to do?

MR. VAN NEST: I'm fine with just the regular disclosures we have which we've agreed on, and they're consistent with Your Honor's rules. I don't care about it, but I know the last time you asked for it, and I just want to be sure if you want it, we do it. I'm not asking for it.

MR. BICKS: I think, Your Honor, it's a good idea --

THE COURT: What is a good idea?

MR. BICKS: The seven -- you know, kind of the rolling disclosure because there is, frankly, so many witnesses -- I think they've got 25, 26 will-call witnesses, and I think it's helpful in that respect to --

THE COURT: I think the reason I must have done that was that the normal rules didn't give you quite enough notice and still by saying seven, you would have the flexibility to choose within the seven, but you -- the other side would be able to get their cross-examination better organized.

Is that what I had in mind? It seems like I probably did.

MR. VAN NEST: Ms. Anderson remembers this better than I do.

MS. ANDERSON: I remember, Your Honor, you did have that rule. I don't remember Your Honor stating specifically what you were most worried about in imposing it, but part of it was delivering that list to you as well.

THE COURT: Okay. In my writeup that you -- the guidelines, what do I require there?

MS. ANDERSON: I believe it's two days' notice, Your Honor.

MR. BICKS: Two days' notice. I thought it was at 2:00 p.m., and then if you were going to use exhibits with the witness that you disclosed on day one to appear on day three,

then the cross-examiner then on day two at the same time would disclose the exhibits that would be used on cross-examination but not impeachment, I thought, as I understand the procedures.

THE COURT: That reminds me, I have got to come, in a minute, to what constitutes real impeachment, but -- so the seven thing -- I'm pretty sure that the reason for that was to give the responding side more time to get their act together because of the need to cross-examine. But I could be talked out of it.

You don't want that?

MR. BICKS: No. I think it's a good idea to do it.

THE COURT: You do want it?

MR. BICKS: Both sides will do it.

THE COURT: Mr. Cooper, what were you about to say?

MR. COOPER: All I want to say is all our concern is with regard to Dr. Jaffe in the liability phase, we would appreciate at least 24-hours' notice so Dr. Kearl can be here.

MR. BICKS: I will do way -- I'll give them more than 24.

MR. COOPER: Thank you.

MR. VAN NEST: Your Honor, just so you're clear, we're not asking for it --

THE COURT: Let's do it. Let's do the -- whatever the rule of seven was last time, let's superimpose that in addition to the normal rule.

Let's come to what is true impeachment. A true impeachment, classic impeachment is they said on the stand that the light was red but in a written statement to police signed and dated by them, they said it was green. Okay. That's a signed statement. Or a letter. All right. It could be that they didn't actually sign it, but they somehow approved of it. They looked at it, they approved it, and then somebody else signed it. That would be an approval, an adoption. That would be good enough for impeachment.

But what I have found is that one side thinks it's something that generally contradicts the whole theory of the other side is impeachment. No. I don't think that's -- that's just case-in-chief material. So true impeachment has got to be pretty specific. So if you're going to hold it back on the theory that it's impeachment, you got -- it's got to be in that kind of category.

The one thing which I will allow for impeachment that is not signed by or adopted by the witness is a video, say, in a case where the plaintiff says that they can't even get out of the wheelchair, the insurance company has got videos of them playing tennis. That's actually happened. So that is impeachment, even though it's not been adopted by -- so I can't -- it's got to be very strong directly contradictory to testimony and something that you can tag that particular witness with, as opposed to just general material that

contradicts the general themes of the other side. So keep that distinction in mind. All right.

MR. VAN NEST: Your Honor, I have one more procedural point --

THE COURT: Sure.

MR. VAN NEST: -- which we left open, and that was now that we're going to be in trial, the one request we have, and I think it could be observed by the parties without any intervention by the Court, is a request that when we're talking about revenue sharing on deals with current partners, that the experts have used broad averages and that the parties stick to broad averages rather than disclosing --

THE COURT: It's okay with me. As long as both sides are willing to do that, I'm okay with that.

MR. VAN NEST: I think -- I'm not sure that we have an agreement, but I do know that the experts are using averages, not particular rev share deals, and I know there is concern about this among our partners as well.

THE COURT: Can we live with that?

MR. BICKS: Can I confer, Your Honor. This is not likely to be a Phase-One issue.

THE COURT: Right. Report back. I wish you would find a way to make this work.

MR. BICKS: I'll try to.

MR. VAN NEST: Thank you, Your Honor. That's all the

procedural -- those, I think, are all the procedural questions I had.

THE COURT: Okay.

MR. BICKS: Your Honor, I don't know, at some point is it appropriate to talk about timing, time of the trial?

THE COURT: Let's talk about it right now.

MR. BICKS: Okay.

THE COURT: What do you want to do there?

MR. BICKS: Well, so --

THE COURT: I've already given you some time limits.

MR. BICKS: Right. So what you said was you get -- it was a total of 19 hours, right? This is where we started. Twelve in Phase One and then seven in Phase Two. We had asked for three additional hours for Phase One, so it was going to be 15 and 7. And --

THE COURT: That's 22 hours.

MR. BICKS: Correct. And the reason, Your Honor, obviously this is not something that we're just kind of willy-nilly suggesting. We really are looking carefully at the issues and the witnesses and the proof and the documents and being pretty practical, actually sitting down going witness by witness, and every time we do it, we're sitting there really in a really, really serious time crunch.

Obviously we know from the Court that there are two critical issues that are outstanding, the OpenJDK issue and

what I call the Apache issue. As we have talked about on OpenJDK, I think they're more -- six, seven, eight experts who touch on that and a number of fact witnesses.

The Apache, we've argued that to some extent, and the Court remembers all the issues with the jury and the questions on that.

As we're just practically looking at all the issues that are out there, you know, the time is something very serious, and so Your Honor had indicated in one of your orders that we would revisit that at this point.

So I wanted to ask for that additional time. Your Honor said you would consider it. And then you, I think in essence, allowed us to kind of -- I think the expression was *bank it* and if we didn't use it, we could use it at a subsequent point. But as I say, I'm not -- I'm totally mindful and I have listened very, very carefully to what you've said about jurors and the time and so on and so forth, but when you really look at the issues that are out there, it's going to be really very, very difficult to present our case in that amount of time. I mean, it's just --

THE COURT: What does Mr. Van Nest say?

MR. VAN NEST: Your Honor, we've come to the conclusion that the time limits you set were good. What you said you might revisit was the split between Phase One and Phase Two. You have 12 for Phase One and seven for Phase Two,

and I think that's perfectly appropriate.

We all know whatever time you give us we'll fill. That has at least been my experience, and I think we have a lot of issues for the jurors, and if we expand the time, the issues are going to get more complex, not less.

So my experience has been -- and I have often been complaining about too little time and I have tried five patent cases in Texas in a week, so I have been on both ends of this. I think the 12-hour limit is fair. We can do it. We should meet it. I think having 7 hours if we get to a damages phase is right. There will be percipient and expert testimony in the Phase Two if we get there.

So you did say you would look again at the split between Phase One and Phase Two. But I think the split you have is a good one and we will fit within it.

MR. BICKS: And, Your Honor, you did -- we did discuss this and we talked -- Your Honor asked the question of how long should we screen jurors for, what was the timing. We debated four or five weeks, and I can't underscore, you know, the -- this is not a rationale to waste time. It's a rationale to make sure the issues are fully vetted and things aren't rushed, particularly as it relates to people understanding the technology. It's very tricky, as the Court knows.

And ordinarily -- we're the plaintiff, and typically the plaintiff likes to -- most jurisdictions go fast, but we have

looked at all the elements. When you look at the experts on the technology, the importance of the packages, you know, the economist, Dr. Jaffe, explaining the markets, and then you put, on top of that the fact witnesses -- they've got 26 will-call witnesses. Not may call; will call. And we have a comparable number.

If you add that up -- and we know that there is fat on those lists and they should be cut down, but there's, you know, a fair amount to cover. We are really talking about 10 years -- as you look at that timeline, at least 10 years of kind of history, and I don't -- I really do say it with conviction that every time we map out the witnesses -- and lawyers, as you know, and I'm mindful of this, are hopelessly poor at estimating time, but in critical areas, we are looking at having to cut pretty substantive things that are very, very important.

The other thing is -- and I hear what the Court is saying about documents, that, you know the Magna Carta example and the 20 to 25, but each side, as you can see from those boxes, you know -- there is a fair amount of documents in the case and it's clearly our duty to cut that down. But I can just see things rushing, and so the three hours, I think, is really critical. Hey, if we don't use it, great, but, you know, I think it is very, very important to us --

THE COURT: All right.

MR. VAN NEST: Your Honor, could I just make one comment? What we see developing here -- which is different from last time. Last time they presented basically one expert on the fair use/copyrightability. Now they've got four or five all to say how critical, essential, and important these declarations are. Right? The 11,000 or 7,000 lines of code out of 15 million.

The reason they want this time is to load up on experts, and we can see that, comparing this trial to last trial. Right? I have essentially the same expert lineup and the same expert that we had last time that is going to cover all of this. They want to put in Schmidt, Kemerer, Jaffe, Zeidman. They have got four experts, all going to get up and here and say, *All these declarations were critical. They are the heart of Java.* That's why they want the extra time.

And Your Honor has already expressed concern -- and I think rightly -- that we load this thing up and lard it up with experts, and that's exactly what they want to do with this expert time, and I don't think it's right.

They should have an expert that talks about fair use. I've got an expert that talks about fair use. We don't need four experts to say how important and critical these things are, and the 12 hours is a fair estimate of what it should take to try this thing in Phase One.

THE COURT: The answer is 15 and 5, grand total 20.

Any unused part of the 15 can be carried forward to the second phase.

MR. VAN NEST: Very well, Your Honor.

MR. COOPER: Your Honor just for clarification, that is five hours per side for damages, and Dr. Kearl does not count during that period of time; is that right?

THE COURT: I was thinking he would count. What have I said, though, in the past?

MR. BICKS: You said he did not count.

MR. COOPER: I think you said he did not.

THE COURT: Oh, well, then maybe I should make it 15 and 4 to leave room for that possibility. Why don't we do this: 15 and 5, but that includes Dr. Kearl.

MR. COOPER: 15 and 5.

THE COURT: That doesn't count your time to examine Dr. Kearl, but it counts their cross-examination of Dr. Kearl.

MR. COOPER: The damage trial will be five hours per party and my direct does not count?

THE COURT: Right. I will have to add in more time for you to do the direct.

MR. COOPER: Okay. Thank you.

THE COURT: But their cross-examination of Dr. Kearl is within that five hours.

MR. COOPER: Thank you.

THE COURT: I had asked you to meet and confer on the

fair use instruction. And I know your briefs are not due on that until later, but give me a heads-up. Are you going to be able to -- is there going to be a lot of issues left for me to decide?

MR. BABER: Your Honor we had a face -- Bruce Baber from King & Spalding.

We had a meet and comfort yesterday face to face with Mr. Silverman and Ms. Simpson. I don't think we're going to agree to a fair use instruction. Where we are right now is we have identified, I believe, five, maybe, things in your draft that both sides agree should be changed. Okay. So we will identify those for you. And then I suspect we will each have some issues that we will raise on the other pieces of your draft.

But we have not been able to reach agreement on complete paragraphs or things like that.

MS. SIMPSON: That's fair, Your Honor.

THE COURT: Today is number 27. Your briefs are due on that tomorrow; right?

MR. BABER: Tomorrow at noon, Your Honor.

MS. SIMPSON: Correct.

THE COURT: All right. Good. Thanks.

MR. BICKS: Your Honor, on the topic of the jury instructions, I don't know, we had suggested at least consideration of a pre-instruction by using the statute and the

factors, and both sides --

THE COURT: The statute doesn't mention -- what's that word?

MR. VAN NEST: *Transformation*.

THE COURT: *Transformation*. So we can't just use -- that would be very unfair to Google to just repeat the statute because the Supreme Court has said that -- so I'm probably going to just give the draft I've been giving, subject to your changes -- I'm going to give something like that, and then I will tell the jury that I will give them a slightly longer version at the end of the case.

MR. VAN NEST: That would be fine, Your Honor.

THE COURT: I am going to pre-instruct. I think they've got to have some idea of what the issues are.

MR. BICKS: Yes. And I wasn't -- I was just focusing on the statute because it's clearly one thing that everybody had agreed on, but however we work it out, I think that would be helpful.

THE COURT: You mean the only things you can agree on are the statute?

MR. BICKS: I shouldn't say that, but --

THE COURT: Come on.

MR. BICKS: It was a good starting point.

THE COURT: Okay. We're going to take up -- let me look at my notes. Give me -- we will take a break in a moment,

but before we do that, tell me what one motion in limine per side that you would like to have argued because we are not going to be able to do everything today and some will have to get submitted. I would like to hear argument on the one involving the memo, the email, Lindholm email and that meeting that preceded it.

MR. BICKS: That, Your Honor, you had asked for briefing on --

THE COURT: You're right. I did. So that hasn't come in yet.

MR. BICKS: Yes, yes.

THE COURT: I guess I can't do that one.

Of the things that have been teed up, is there one per side that we could hear argument on today?

MR. BICKS: So on our side, Your Honor, I think we would address the -- if it would be helpful, the Apache situation. We touched on it, but if it would be helpful to the Court, I think it's such a critical issue that we'd be prepared and welcome the opportunity to address that.

MR. VAN NEST: That would be fine, Your Honor. I don't think any of ours --

THE COURT: On your side, is there any other motion that you feel is important to argue today?

MR. VAN NEST: I don't think so, Your Honor. I think we're good. You can decide them on the paper. I think arguing

Apache is fine. That's their motion.

THE COURT: Let me look at my notes here.

MR. BICKS: Obviously, Your Honor, we are prepared to help as we could. I had on my list Federal Circuit, what you had called the factoids and kind of the import of that.

THE COURT: I have a plan there. I think further argument would only encumber my plan.

MR. BICKS: Don't want to do that.

MR. VAN NEST: Our motion that we would want to argue, Your Honor, is Lindholm, but as Mr. Bicks pointed out, that is not teed up yet. That is coming in later in the week.

THE COURT: Let's do this. Let's take a 15-minute break and come back and hear about the Apache situation. All right?

MR. BICKS: Yes, Your Honor.

(Recess taken at 9:21 a.m.)

(Proceedings resumed at 9:34 a.m.)

THE COURT: Okay. On that timeline, what I'd like to do is hand out to the jury -- if you put it sideways on a piece of paper, they will be able to draw in -- make little notes on their timeline, their copy of it, so you don't want the wording to be too big because it won't leave enough room for notes, but on the other hand, if it's not big, they may not be able to see it across the room on the blowup, so they will see it on the blowup, but they will also have a handout copy. Okay? Got

that idea?

The other thing that my law clerk says we could use is one of the issues that Google has raised is whether or not there is a right to a jury trial on disgorgement and that has not been briefed. Google's still making that argument or not?

MR. VAN NEST: Yes, Your Honor.

THE COURT: All right. So then let's say by -- when can you --

MR. VAN NEST: Friday at noon.

THE COURT: Friday at noon you submit a brief.

MR. VAN NEST: Yeah.

THE COURT: Can you also submit a brief by Friday at noon, Ms. Hurst?

MS. HURST: Your Honor, we have addressed this in our trial brief already, but we would be happy to file an additional brief, if the Court wishes.

THE COURT: My law clerk said no one had given more than one paragraph. Had you given more than one paragraph?

MS. HURST: We gave you -- hold on. I think we gave you six pages.

THE COURT: Six pages. That's more than one paragraph.

MS. HURST: We gave you from pages 10 to 17 so seven pages, Your Honor, in our trial brief.

THE COURT: Let's do this. You respond by Friday at

noon, and by Monday at noon, if you wish to do a reply, you may.

MS. HURST: Thank you, Your Honor.

THE COURT: All right. Thank you. Okay. Let's hear about the Apache situation.

MR. BICKS: Your Honor, I have to call an audible here. I got out ahead of myself on Apache, and Ms. Simpson reminded me that we felt we had covered that with you, and unless you had any further questions on it, we thought what may be a more prudent use of our time is to preview for you -- it was motion four -- the issue that related to whether or not any copying was required, you know, to use the Java language and you had asked for additional briefing on that.

What we thought is maybe Ms. Hurst just preview just very briefly kind of the direction we were thinking of going there to kind of give the Court --

THE COURT: Is this the 3 APIs versus 37?

MS. HURST: Yes, Your Honor.

THE COURT: That's a good point.

Is that all right? Can we swap gears and go to that subject?

MR. VAN NEST: I understood that we were going to be talking about possibly a stipulation --

MS. HURST: And that's what I wanted to inform the Court.

MR. VAN NEST: I'm not sure why we need to preview this. You set this for briefing on Friday, and I think in the meantime, we've talked about possibly a stipulation.

THE COURT: All right. Why don't we just leave it at that then and not take time up now.

MR. VAN NEST: We're happy -- we're fine not arguing Apache. The only point I would make, Your Honor, is of all the motions, that's one that would be useful for me to know before the openings. The others can probably drag, you know, in my case, but that's one that would be good to know the answer to.

THE COURT: Well, tell me this, because I have been working on it. I will just ask you a question.

Apache could confer on Google no greater rights to use the Java System than it had to begin with, meaning that Apache had to begin with?

MR. VAN NEST: That's right.

THE COURT: And since Google knew about the field-of-use restriction -- in fact, Google even sent a letter complaining about it; right?

MR. VAN NEST: Mr. Paige is the one that is going to argue this motion if we are going to get into argument.

THE COURT: Come up here, Mr. Paige. I don't want to argue it in depth, but I want to have in mind how you answer this point.

So to use your timeline, where is Apache on here? It's

not on here?

MR. VAN NEST: It's not on the timeline, Your Honor.

THE COURT: All right. So --

MR. VAN NEST: We had only -- we only had five items each, but Apache comes out roughly --

MR. PAIGE: May of 2005, Your Honor, is when it started.

THE COURT: All right. Well, anyway, May 2005. So there came a point where Google itself sent an open letter to -- and for that matter, Oracle did, too, before it acquired Sun -- an open letter complaining about the field-of-use restriction.

MR. PAIGE: That's right, Your Honor.

THE COURT: So you can't say you didn't know about the field-of-use restriction. So how can you say that you thought you got some rights greater than -- how can you say that you thought Apache had any right to let you use the SSO and the headers?

MR. PAIGE: Because, Your Honor, the field-of-use restriction was on the TCK license that would allow, if Apache were to pass the TCK, Apache to call itself Java. That was the point of the TCK license. Apache wanted to say *we are compatible, we are an implementation of Java that is fully compatible*, and in order to do that, they needed to have the right to take the TCK and pass the TCK. That is what the

license they wanted was.

Sun never came to Apache and said *You can't use the declaring code*. They just said, If *you want a TCK license to call yourself Java, you have to accept this field-of-use restriction*.

And on the point of the letter, as Your Honor noted, it was sent by Oracle, as well as by Google, and in fact, Exhibit 10 to the Mullen declaration shows that Oracle was the one who came up with the letter in the first place.

THE COURT: But you're still begging the question of what was the -- even if the field-of-use restriction was on something else, how do you get around the issue of what did Apache -- what rights did Apache have to use the Java language in the first place?

MR. PAIGE: To use the Java language, the same --

THE COURT: Or the 37 APIs. To use the 37 APIs.

MR. PAIGE: We are not claiming that we have rights derived from Apache, that the Apache license gives us particular rights to the declaring code. Obviously it does give us rights to the implementing code that Apache itself wrote and that it licensed to us under the Apache license.

But as to the declaring code, the point of Apache is that it shows that there was industry custom and practice of re-implementing APIs using the declarations in Apache, in GNU Classpath, in Android. Using those when you wrote your

implementing code. And there is not --

THE COURT: Does that mean that to get to that point, you have to concede that you -- that you knew that it was copying the declaring lines of code and therefore it was fair use? I mean, how are you going to fit that with the jury instructions? What is your argument going to be to the jury as to --

MR. PAIGE: I believe, Your Honor, it would be that if this was in fact copyrightable, something that was debatable at the time, then because there were projects that were doing this without complaint from Sun, it showed that it was at least considered a fair use if, in fact, the declarations were copyrightable, which, again, was a matter of some debate at the time.

THE COURT: So you're saying -- let me see if I got your point. Your point is that Sun knew that Apache was using those 37 APIs and probably a lot more --

MR. PAIGE: Using 166, I think, Your Honor.

THE COURT: But without complaint.

MR. PAIGE: That's right. Apache asked for a TCK license, but Sun never said *you can't use the declarations.* Never said it. There is nothing in the record saying Sun said cease and desist from using declarations. They just said, *We're not going to let you take the TCK and call yourself Java without accepting these field-of-use restrictions.*

THE COURT: Is *calling yourself Java* the only consequence of the TCK?

MR. PAIGE: I don't think so, Your Honor. I think it also gives certain rights to other intellectual property like patents held by Sun, for example, perhaps. So I think there are other consequences as well, perhaps.

THE COURT: It seems like there was the further argument -- and I will hear from the other side on this in a second. But it seems like there was the further argument that the TCK -- it was something like you couldn't use Java at all unless you contributed it back to the open-source community. What am I thinking of there?

MR. PAIGE: I think you are thinking of OpenJDK, Your Honor, which is a way that Sun released Java SE later under the GPL 2 license plus Classpath exception, and if you wanted to take the OpenJDK license, you would then have to contribute it back. But that was a separate issue later in time than the Apache project.

THE COURT: Hold that thought for a moment.

Who is going to speak over there?

Ms. Simpson, what do you say to -- Paige; right? Mr. Paige?

MR. PAIGE: Yes, Your Honor.

THE COURT: -- Mr. Paige's point that Sun never raised one complaint and yet it knew all about the Apache project and

knew that those APIs were being used with different implementing code and stood by and said nothing. The only time they ever complained was the field-of-use restriction, which went to a different issue altogether. What is your argument?

MS. SIMPSON: Your Honor, that's really not how the facts went.

So Apache took a spec license from Sun which allows them to do an independent implementation of the Java APIs. Part of that spec license requires that in order to do that, you also pass the TCKs. It says *and pass the TCK* in the spec license. It's a requirement of the spec license.

TCK is not limited to branding. It does require that you pass it to compatible with the Java implementation.

So while Apache was building the Harmony project, they were in compliance. They took a spec license, they were building the project. They came back to Sun for the TCK, and that's where the dispute arose.

At no point did Sun ever say, *It's fine with us that you're not taking the TCK*. There was an actual dispute over whether there should be or shouldn't be a license granted to the TCK.

And Apache implored Sun to allow it to have the TCK without the field-of-use restriction, but Sun said no, and Google also knew that there was no license granted to the TCK because they sent the letter to Apache and signed the letter

saying, *Please, please, give Apache a license that gets rid of the field-of-use restrictions*.

So all the parties knew that this was a licensing dispute and that Apache was an unlicensed use of Java. Unlicensed. It had not been licensed.

So for Google to get up and say that they've gotten their code from Apache, it's going to lead to absolute confusion amongst the jury thinking that indeed they did have a license to that code through Apache when Apache was not fully licensed itself.

THE COURT: The field-of-use restriction was a -- where did that come in? That was in the TCK?

MS. SIMPSON: Yes, Your Honor. It requires you to use it on a general purpose computer, and it does not allow use on a mobile device.

THE COURT: All right.

Mr. Paige, what do you say to Ms. Simpson?

MR. PAIGE: Two points, Your Honor. First, saying that Sun complained about this is actually opposite the record. Jonathan Schwartz said *Apache can ship today*. Right? He specifically said, *They can ship today. There is no reason they can't ship today*. Second --

THE COURT: Wait a minute. What do you mean? When did he say that?

MR. PAIGE: He said that in May of 2007, Your Honor.

THE COURT: When did Google download it from Apache?

MR. PAIGE: I would think sometime around that timeframe, Your Honor. I don't know the exact date.

THE COURT: Well, let's see. November '07, Google releases Android Software Development Kit. It doesn't say on your timeline when it got downloaded.

Ms. Simpson, do you know when the download occurred?

MS. SIMPSON: When Google downloaded Apache code? I do not, Your Honor.

THE COURT: Was it before or after? Did he make that statement before or after the download? And don't guess at it. If you don't know, just say you don't know.

MR. PAIGE: I don't know the answer, Your Honor, but his statement is Exhibit 9 to the Mullen declaration, TX2341, his report of it.

THE COURT: How did that come up? How did Schwartz have an occasion to make that comment?

MR. PAIGE: Because there were disputes about whether or not they should be granted the TCK license without a field-of-use restriction, and in response he said, *They can't ship today. They just can't call themselves Java.* That was his trial testimony last time as well, Your Honor.

In terms of the specification license, the statement that Apache took a specification license, in the Document 1081, our proposed findings of fact, we had a finding of fact Apache

never took a license from Sun for Harmony, and Oracle said they agreed, and therefore Apache never had a license from Sun for Harmony. So this idea that they were taking this specification license I don't think is supported by the record.

THE COURT: Wait a minute. Ms. Simpson said that there was a specification license from Sun to Apache.

MR. PAIGE: There was --

THE COURT: Is that right? Did I say that right?

MS. SIMPSON: Correct, Your Honor.

THE COURT: That this whole story starts with a specification license from Apache to a Apache from Sun.

MS. SIMPSON: Yeah. And there is an example of the spec license at Trial Exhibit 610.1.

THE COURT: Is it one signed by Apache?

MS. SIMPSON: No, Your Honor. It's a click-through license.

THE COURT: But you have one somewhere that was actually signed by Apache?

MS. SIMPSON: It's a click-through license, Your Honor. There is no signature on the license.

THE COURT: All right. Is there testimony that they clicked through it?

MS. SIMPSON: Well, to download the Java implementations, you need to click through this license.

THE COURT: Is that part agreed to? Is that the way

it happened?

MR. PAIGE: I don't know what Apache would have to do. I believe this is part of some bunch of software files that they had on an SDK. I don't know what the status of having to click through anything is.

THE COURT: Well, but I'm sure Google does the same thing with click-through licenses on its licenses.

How did Apache get it? Do we have to bring somebody in from Apache to testify? You're the one that wants this story in there. How come you just know the parts that help you and not the parts that hurt you? Come on, you got to know the whole story, Mr. Paige.

How did Apache get this license?

MR. PAIGE: I don't know that Apache did get this license, Your Honor. They said last time Apache never took a license from Sun for Harmony and agreed with it.

THE COURT: Then how did Apache get the Java language to begin with?

MR. PAIGE: The Java language is free and open for all to use, Your Honor.

THE COURT: Don't you have to download it from some source? Like you go online, you click through it, and it comes to your computer after you say *yes* and agree to the terms of the license?

MR. PAIGE: It's in a book, Your Honor. They have the

Java application programming interface. They have the Java programming language specification. There are many books that explain how this works.

THE COURT: We are going -- are we really going to have a dispute -- is there somebody from Apache who -- how about that guy who said this was a crime or something?

MS. SIMPSON: Illegal. Yes, Your Honor.

THE COURT: Has he been deposed?

MS. SIMPSON: He has not been deposed, Your Honor.

THE COURT: By the way, while I'm on that, please don't get me in this position where you are insisting that Google produce witnesses and vice versa, and, in other words, you all subpoena -- you subpoena the people you want for trial unless you work out some agreement.

Do you understand what I'm saying? Because you shouldn't come to me at the last minute and say, *We expected them to bring their witness to -- their -- we want them but we didn't subpoena them. You* got to subpoena the people unless you work out an agreement. Understand that?

MS. SIMPSON: Yes, Your Honor. We have been underway in that process.

THE COURT: If you have to stand out in front of their house at midnight, you have my permission to do that. Because the lawyer won't accept service, then you get out there at midnight.

To come back to this, we are going to have a dispute over whether or not Apache even had the license to use Java? I don't know.

MS. SIMPSON: Your Honor, I would just add that that goes to our entire point on this motion, that it's prejudicial to the jury to be putting all this extra evidence in front of them, and whether Apache was licensed or not licensed or whether it was authorized or unauthorized, that's a separate point that has really very little to do with whether Google was authorized in what it was doing.

And the fact of the matter is that the -- there is another point I wanted to make in response to Mr. Paige. You know, he quoted at least five times in their brief that Mr. Schwartz said that Apache was free to ship. But the quote that they're taking is completely out of context of the document that they're looking at, which is an article, and if you look at the sentence before and the sentence after, in context what he means is they're free to ship if they take the TCK and then Apache says *but we can't take the TCK because that's contrary to our free and open software philosophy*.

So they're taking that quote completely out of context, and their entire opposition hinges on the free-to-ship language that they repeat over and over again.

THE COURT: Wait a minute. Is that true, Mr. Paige?

MR. PAIGE: No, it's not, Your Honor. At trial

Mr. Schwartz said they were free to ship. They just can't call themselves Java. That was his testimony at trial.

THE COURT: What do you say to that?

MS. SIMPSON: At trial, Your Honor, he also admitted that he did not have knowledge about the licensing terms and that he was not speaking as a lawyer, nor was he giving a legal opinion. That it was merely his business view that they should go ahead and ship.

MR. BICKS: 2341, that exhibit, Your Honor, we just pulled up on your screen the article Ms. Simpson spoke about. 2341.

THE COURT: I wish it was on my screen. I don't have any -- nothing there that -- maybe --

MS. SIMPSON: Would you like a hard copy?

THE COURT: If you have one, that would be great.

All right. Let's go back to square one. So, Mr. Paige, looking at this problem from your point of view -- and I've tried to think about this problem from both sides' viewpoint so from your point of view, your best argument is that this goes to rebut a charge of willfulness.

MR. PAIGE: No, Your Honor. It goes to fair use.

THE COURT: Why is that?

MR. PAIGE: Because it shows the industry custom and practice at the time was to regard the declarations as something that could be reimplemented using your own

implementing code.

THE COURT: One instance is a custom?

MR. PAIGE: No, Your Honor, there was GNU Classpath as well. They were doing the same thing.

MS. SIMPSON: Your Honor, there is no custom of unlicensed use because this was a dispute over a license, right? And at the end of the day, Apache put the Harmony code to bed because they couldn't resolve the issues. And they acknowledged at the end of the day that the spec license is -- it's a license that you have to take and that Sun gets to control who they license it to. There is a document that actually says that from Sun, so -- I mean, from Apache.

So the fact that this is a custom and practice is first, you know, false because we're talking about companies that had disputes over licensing terms. To just say that there were people out there using this with no restrictions and that there was no license and everything was fine and Sun was happy with it is not even correct.

But again to your point, Your Honor, there is no argument here that what is going on here is a custom. There just isn't any argument there.

MR. PAIGE: Of course, Your Honor, the December 2010 statement she is referring to by Apache is after this lawsuit was filed, after Oracle had bought Sun, after they had kind of changed their mind about all of this.

THE COURT: But I guess it's true that they had bought it, but still before the lawsuit and before the acquisition, Sun was insisting on this field-of-use and the TCK. Sun never gave up on that, did they?

MR. PAIGE: Sun never said Apache could call itself Java, that's true. That's what this was about. The TCK and compatibility is a red herring. This is just about whether or not they could call themselves Java. There isn't any license needed to --

THE COURT: But do you have a memo in-house from Google that says something like this: *We are going to use Harmony from Apache. It uses the identical Java APIs that we're interested in and uses the identical headers, but with different implementing code, but that's okay because it's customary to use -- carry those over?*

I don't think you have such a memo but, do you?

MR. PAIGE: I don't know that we do, Your Honor, but the point is that Sun never said *Cease and desist from using our declarations.* They never said *You can't do this.* They just said, *We're not going to let you call it Java.*

I mean, that Apache Harmony project was used in products by IBM demonstrated at JavaOne in 2009. Someone got on stage and said *Here is Apache Harmony. It can be used just like any other Java platform.* Sun didn't say, *What are you doing? You can't do that. Those are our declarations.*

THE COURT: When was that again?

MR. PAIGE: That was in June of 2009, Your Honor.

THE COURT: That was after the fact, wasn't it?

MR. PAIGE: After what fact?

THE COURT: After Android had been released.

MR. PAIGE: Yes, it was.

THE COURT: You could not have relied on that.

MR. PAIGE: It was.

Look, Mr. Schwartz said it was open APIs, compete on implementations. The meaning of that is that you can use things like declarations and write your own implementing code in order to do it. That's good evidence of fair use, Your Honor.

MS. SIMPSON: Your Honor, I have a document that says the opposite of what you just asked Google for.

THE COURT: Hand that up.

MS. SIMPSON: This is Trial Exhibit 405. This is an email from Eric Schmidt to Bob Lee. But the quote is -- this is them writing to each at Google -- "Sun puts restrictions in the Java SE TCK license which prohibits Java as the implementations from running on anything but a desktop or server. These restrictions prevent Apache Harmony from independently implementing Java SE. Harmony can put those restrictions on their own users and still Apache license the code, not to mention Android, though that's water under the

bridge at this point."

So here they're expressly saying that they can't do the independent implementations without following the TCK.

THE COURT: Let me ask you, Ms. Simpson, why don't you want the Apache story in there? I mean, you want to prove willfulness; right? What is your plan for proving willfulness?

MS. SIMPSON: Your Honor, we have plenty of evidence that Google knew that these APIs were subject to license, that they needed a license, that they were going to implement even though they knew they needed a license, and that they would pay the price later, more or less.

With respect to Apache, it's just an awful lot of information, and, frankly, Your Honor, it's easy for Google to throw the Apache terms around. It's going to take quite a bit of time for us to explain the story back and forth with the letters back and forth to Sun. We have to explain the TCK. We have to explain the spec license. We have to go into all of this extra evidence. We don't have a lot of time. And so this is not something that we want to consume our time with, plus we're very concerned at the end of the day, the jury is going to think, as they did last time -- Your Honor will remember that they sent notes to the Court --

THE COURT: Okay. They sent a lot of notes and it was a point of confusion and I'm sympathetic to you on that, but here's the argument the other way. You're accusing them of

willfulness, and anybody who is accused of willfulness has the right to explain to the jury where they got the offending code from.

So we can't just put duct tape over their mouth and not let them explain where they got the code. The jury is going to want to know where did they get the code? Did they steal it from Java? Did they write it from scratch out of one of these books themselves? Where did it come from? And it came from someplace, and the true story is it came from Apache Harmony.

MS. SIMPSON: Well, some of it did, Your Honor. But I don't think that's necessarily relevant because the fact of the matter is they did not have a license to do what they did and Apache doesn't give them a license to do what they did because it was also an incompatible version of Java, and as you have said before, Your Honor, they stand in the shoes of Apache.

So if Apache is unlicensed, they're unlicensed, and there is not really a reason to get into all of that extra evidence to merely display the fact that they got their code from an unlicensed source.

THE COURT: Mr. Paige, how do you get around this, the water-under-the-bridge email.

MR. PAIGE: Certainly, Your Honor.

THE COURT: This is like from Mr. Big in the company.

MR. PAIGE: What it's saying is that because the field-of-use restriction was in there, Apache is effectively

unable to distribute its software because Apache licenses open-source software, and one of the main rules of open-source software and free open-source software is that you cannot put restrictions on how software is used. It's freedom number zero in the Free Software Foundation.

So if you say, *You can have my software but you can't use it for X,* that violates all the rules of free and open-source software. So as long as they're not permitted to have a TCK license free of a field-of-use restriction, they are effectively not allowed to distribute their software under their license. That's what that's about. It's not about any sort of problem --

THE COURT: It says, "not to mention Android, although that's water under the bridge at this point." That to me sounds like Mr. Schmidt knew that there was a fundamental licensing problem.

MR. PAIGE: I believe that is an email from Mr. Lee to Mr. Schmidt.

THE COURT: It is, but -- that's true. Mr. Lee is the one that sent it, but he sent it to Mr. Schmidt.

MR. PAIGE: He did. That's true, Your Honor.

THE COURT: Is Mr. Lee going to testify? Are you calling Mr. Lee?

MS. SIMPSON: I don't think he is on our list.

MR. PAIGE: I don't believe so, Your Honor.

THE COURT: Is Mr. Schmidt going to testimony?

MR. VAN NEST: Absolutely, Your Honor.

MS. SIMPSON: He is, Your Honor.

THE COURT: How is he going to get around this? This is a pretty bad document for Google, I would say.

MR. VAN NEST: I'm not sure -- he testified last time. I'm not sure that this was discussed with him or not. But I think it's what Mr. Paige is talking about. This is a different issue a year after the fact.

Remember, the Apache story is sort of a fundamental part of the story, as you observed. That's where Google got the implementing code. And what Mr. Schwartz said last time was our whole business plan at Sun was make the language and the API declarations open and people compete on the implementations. And one example of that was GNU Classpath. One example was Apache. One example of that was Android. And that explains why, when Android was released, Mr. Schwartz said it put a rocket onto Java. It's fine. They weren't complaining. This didn't come up until Mr. Ellison bought the company.

So to try to separate Apache out is wrong. We're not going to claim that the Apache license gives us a license to the implementing code or anything else. Our argument is that it was considered in the day by the copyright owner, Sun, to be a fair use because it tolerated the use in GNU Classpath. It

tolerated the use in Apache. So Google went and used the same declarations that everyone else was using and reimplemented it's code. That's why it took three years and all that money. They reimplemented the code just the way Apache did, just the way Sun did.

This license issue is a complete red herring. What Apache wanted to do was say *we're Sun compatible* and of course what Google originally wanted to do was say *we're Java compatible*. Apache wanted to say we're *Java compatible*. Google negotiated for a similar license, right? We negotiated. It broke off because the parties couldn't agree on control. But that does not mean -- this whole TCK thing is a red herring.

Google didn't use the tea cup, the coffee cup. Google didn't call itself Java, and that's why Mr. Schwartz said it's okay. This is critical evidence, the Apache story, of kind of at the center of the story, where we got the code, why we did what we did, why Mr. Schwartz, on behalf of Sun, said it was okay to do this. I don't know how you could try the case without this evidence. It's central to everything, really.

And for them to say they had a spec license when last time they agreed to a stipulated fact that there was no license for Apache -- it's a stipulated fact in the findings we submitted after the trial. They agreed; we agreed. Apache didn't have a license.

They liked that point then because they wanted to make the

point Apache didn't have a license so Google didn't get anything from Apache. Now they say there is a spec license. I don't think that's true because Apache didn't download any implementing code. Apache didn't download the code for Java. They took the declarations that Mr. Schwartz will testify were free and open to use and they wrote their own code, just like Google wrote its own code.

So I don't know how you separate Apache out. It's not a complex story where -- they want to make it complex. They want to throw in the spec license. They want to throw all that in, and, fine, they cross-examined Mr. Schwartz on that last time and I fully expect them to cross-examine him on that again, but to say somehow we're going to cut out Apache from the middle of the case and have somebody give some sort of explanation, that makes no sense whatsoever.

This is what Mr. Lee said. Mr. Lee said exactly what Mr. Paige said. He is talking about *we can't call Android Java.* You say there is water under the bridge. *We can't call Android Java.* That was in his testimony last time.

THE COURT: Where does it say that in this memo?

MR. VAN NEST: This is what he testified to about the memo in the first trial.

THE COURT: Who said that?

MR. VAN NEST: Mr. Lee.

MR. PAIGE: Mr. Lee.

MR. VAN NEST: At page 989 of the transcript. Mr. Lee said what he's talking about in this memo is you can't call Android Java. That's water under the bridge. Why we released it as Android, not as Java. Just like Apache couldn't call itself Java. Just like GNU Classpath couldn't call itself Java.

This spec license is a red herring, and they don't like it, but last time they stipulated that there was no license for Apache.

THE COURT: Is that true, Ms. Simpson?

MS. SIMPSON: Your Honor, Apache was not licensed. Let me just say, this is not a red herring. The spec license is very clear. It has three requirements. If you want to do an independent implementation, which is what they are talking about, you want to write your own implementing code, you use the spec license. If you use the spec license, you have to fully implement the spec, you have to not modify, subset or superset the spec, and you have to pass the TCK.

The TCK is not just about calling things *Java*. The TCK is how Sun ensured that implementations were compatible, which was a key element of what they were trying to do with their licensing scheme. This is not a red herring and it is not about branding. It's about passing the TCK.

So, yes, Google could do this, too and they could pass the TCK, but they chose not to. And Apache had a dispute. They

didn't want to accept the TCK the way that it was worded. They didn't want the field-of-use restrictions. It was a dispute. It was a licensing dispute.

Yes, they were not licensed. At the end of the day, they were not licensed. Because when you refused to do the third part of this requirement in the spec license, the license terminates. The spec license terminates under its terms. If you fail to comply with any material provision or act outside the scope of this license, the agreement immediately terminates. So, yes, when they didn't --

THE COURT: Tell me, did Sun realize that Apache had the Harmony code up on its website and it could be downloaded?

MS. SIMPSON: They did, because, Your Honor, they were talking about -- they were negotiating and trying to resolve their differences. They were aware that they were implementing the code. They were aware that they had a project. No one was hiding their head in the sand that Apache Harmony was out there developing, and, frankly, I think they would have fully supported it had they taken the TCK and made it, you know, compliant.

THE COURT: But knowing that there was a TCK dispute, did Sun ever put out a statement saying *nobody should be copying and downloading because that's a violation of our copyright*?

MS. SIMPSON: I don't know that they explicitly did

that, Your Honor, but these letters were open on the web. You know, these letters back and forth about the dispute over the TCK were not just between the companies. These were open letters.

MR. VAN NEST: Your Honor --

THE COURT: Wait, wait. I'm sorry.

Mr. Bicks, did you want to say something?

MR. BICKS: No. I was just stretching. Sorry.

THE COURT: These lines of declaring code, what do you say to the idea that it was customary at the time that the lines -- that the declaring lines of code were free game? Anybody could use those as long as they had their own implementing code?

MS. SIMPSON: Well, Your Honor, it comes right back to the spec license. The spec license is what allows people to do that, right? You take the specification, you can develop your own implementing code. But you're doing it within the licensing scheme that Sun has set forth, and that licensing scheme requires you to pass the TCK. And when you don't do that, then you are no longer a licensed entity.

THE COURT: Why would someone want to have their own -- why wouldn't they just take the original Java lock, stock, and barrel? Why would they want to have their own implementing code?

MS. SIMPSON: Well, Your Honor, I think you would

probably have to ask the folks that are doing that, but sometimes there are tweaks that they would want to make to that code, and as long as they were compatible, they would have that sort of in-house and they'd be able to run that code source in-house if they wanted to do that.

But the fact of the matter is, Your Honor, no one really did that for a commercial implementation. And I know they keep mentioning IBM, but IBM was licensed. It was a Sun licensee. So for them to trout IBM out as a person using Apache Harmony in a commercial sense, they had a global license that covered their activities.

THE COURT: From Sun?

MS. SIMPSON: From Sun.

THE COURT: Is that true?

MR. PAIGE: I don't know whether that's true or not, Your Honor. I mean, that's their licensing between them and IBM, but certainly no one said, you know, *IBM, you can do this at JavaOne publicly, say Apache Harmony is great, but anyone else sitting out there in the audience, you can't use Apache Harmony*. Never said.

MR. VAN NEST: Your Honor, if I just could add that you went over this with Mr. Schwartz yourself while he was here. And what -- and at pages 1976 through 78, 19 -- yeah. And you asked him did they, Apache, have a license, and what he is talking about is they -- they can't use the trademark. He

says, "They participated in our Java community process." I'm showing direct exam Schwartz, and then you interrupted to ask a question at page 1976. And he said, "They did participate in our Java community process, which is the way we brought people together to enhance technologies. But they didn't want to live by the financial requirements of paying Sun for a license to the brand, and although that's a trademark issue in the Java world, the trademark issue and the specs are tied in that if you pass the test to prove you're compatible, then we allowed you to call your product *Java compatible*. But if you didn't, you could still make the product available, but you couldn't call it *Java*."

Again, Schwartz, "We couldn't stop people from creating brand Java and Oracle" -- oops. Excuse me. "Creating their own technologies. And they could call them, you know, black or white or Fred or Bob. It's up to them. That's not our province."

I mean, you went over this. They want to make this more complicated than it is. Apache was out there. Sun knew everything they were doing. They were using the declarations. And Mr. Schwartz will testify to all of that and he'll testify that he said publicly, *You can ship Apache today. You just can't call it Java*, just like he did last time, and I'm sure he will give you the same answers you asked last time, too.

There was a trademark issue. That's the TCK. But it

defies imagination if -- was this all going on behind Sun's back? Heck no. It was all out in the public. And the statement from Sun's CEO was, *You can do this. You just can't call it Java.* Just like GNU Classpath, just like Android. That's why when Android was launched using the same declarations, their own implementation, he said, *Welcome to the community. We're happy.* It's all part of the same story. They would love to carve it out, but it can't be carved out. It's part and parcel of what happened.

MS. SIMPSON: Your Honor, a few pages later, Mr. Schwartz admits that he doesn't know what the licensing terms are, and the fact of the matter is he's just wrong on the licensing terms.

I would like to direct Your Honor back to the article I handed up which is really taken out of context. If you look at the flow of the text in the article, Apache is saying it's -- it's an interview or it's a quote from Jonathan Schwartz, and it's embedded in between two discussions about how the TCK is needed. So I encourage Your Honor to look at that. It's the third paragraph, fourth paragraph, fifth and sixth paragraphs --

THE COURT: Read it out loud.

MS. SIMPSON: It says -- the sentence preceding Schwartz's quote is, "Apache said certain, quote, fields-of-use, unquote, restrictions regarding the TCK were

preventing it from adopting Sun's technology for use in Harmony. Jonathan Schwartz, CEO at Sun, said in a press conference, 'There is no reason that Apache cannot ship Harmony today. We are very focused on the GPL community'."

Then it says, "That is technically true, but Apache officials said that to do so with the TCK restrictions in place would actually go against the Apache software license."

So they're not going to ship because they don't agree with the TCK, but everybody agrees the TCK is needed, including Apache.

MR. PAIGE: That's what I just said about open-source software, Your Honor. The Apache license doesn't allow you to say you can't use open software for a particular purpose. That goes against open-source requirements. So they couldn't ship if the field-of-use is there under the TCK.

THE COURT: Is there some independent witness, other than Schwartz, somebody, a professor, maybe, who could say, *I lived through that time period and Google is correct or Oracle is correct that either it was or was not free game for anybody to use the declaring code as long as they didn't call themselves Java?*

MR. PAIGE: I think Mr. Phipps, Your Honor, was in Sun's open-source office.

THE COURT: Who?

MR. PAIGE: Mr. Simon Phipps.

THE COURT: Is going to be a witness?

MR. PAIGE: He is.

THE COURT: What is he going to say?

MR. PAIGE: I believe he would tell you that that is the kind of thing that was allowed.

THE COURT: He is in whose open-source office?

MR. PAIGE: Sun's.

THE COURT: Did he testify last time?

MR. PAIGE: He did not.

THE COURT: Has he been deposed?

MR. PAIGE: I don't believe so, Your Honor.

THE COURT: He is going to be a witness?

MR. PAIGE: Yes, Your Honor.

MS. HURST: Your Honor, we have asked for his deposition, and he was not disclosed the last time as a trial witness on this topic, and they have refused to give us his deposition. And that's the subject of one of our motions. We tried to get it resolved with the depo and they wouldn't give him to us.

THE COURT: Was he properly disclosed under Rule 26?

MR. PAIGE: He was, Your Honor.

THE COURT: Well, I don't -- I don't think I can just order him -- if he was properly disclosed, you could have taken him back at the time -- I'm talking about was he disclosed in your initial disclosures?

MS. SIMPSON: In the first case, Your Honor.

THE COURT: But have the initial disclosures been updated?

MS. SIMPSON: They were.

MS. HURST: Your Honor --

THE COURT: If he's been disclosed all along, you could have deposed him all along.

MS. HURST: But he was not disclosed on this subject matter, Your Honor. He was disclosed on the patents, the asserted copyrights, the asserted works, Java, Android and its affect on the Java market and issues related thereto. He wasn't disclosed on Apache, Your Honor. There is no mention here of Apache or of licensing practices or licensing terms, and that's why we've asked for the deposition, Your Honor.

MS. SIMPSON: This was their initial disclosure from the original case.

THE COURT: What do you say to that point?

MR. PAIGE: Mr. Kwun.

MR. KWUN: Your Honor, I mean, he was disclosed -- as Ms. Hurst said, he was disclosed on Java and he was disclosed on Android and its effect on the Java market. But Java alone -- Apache Harmony is an implementation of class libraries for Java. So if he was disclosed on Java and he is -- he was the chief open-source officer at Sun.

The fact that he's disclosed on Java, the fact that his

job duty was open-source issues, I don't see how they can claim surprise that that would include within it --

THE COURT: Where does he work today?

MR. KWUN: I actually don't know what his current employment is, Your Honor. He is not employed by Google. He is not employed by Oracle. He is not employed by Oracle America.

THE COURT: When did you make this motion? I was unaware of this motion.

MR. KWUN: Your Honor I believe it was mentioned in their trial brief, not in a separate motion.

MS. SIMPSON: When he appeared on their witness list, Your Honor, we asked them for the deposition.

MS. HURST: Your Honor, the disclosure that I was referring to was in August of 2011.

MR. KWUN: Actually it was disclosed on July 6, 2011.

MS. HURST: Okay. This Proof of Service says August 26, 2011. I'm just reading through the Proof of Service, Your Honor.

MR. KWUN: He was first disclosed on July 6, 2011. It was repeated in a later disclosure --

THE COURT: Was he disclosed on the subject of open-source practices and that kind of thing?

MS. HURST: No, Your Honor. He has never been disclosed on that subject.

THE COURT: Is that what you are going to present him on?

MR. KWUN: I'm sorry, Your Honor. If I could just beg your indulgence and ask you to repeat the question.

THE COURT: You are going to be presenting him as a witness on open-source practices at Sun?

MR. KWUN: Yes, Your Honor. Open-source -- not open-source generally. Open-source related to Java.

THE COURT: Is he in the Bay Area?

MR. KWUN: He is in the UK at the moment.

THE COURT: UK. Is he coming over -- when is he coming to testify?

MR. KWUN: He is prepared -- he is coming in early May so he will be prepared to testify during our case in chief.

THE COURT: I don't know. How many of these kind of problems do you all have?

MR. KWUN: Your Honor, this is --

THE COURT: Do you have a similar problem with one of their witnesses?

MR. KWUN: We have issues with witnesses that they have named who were never disclosed such as Sergey Brim.

MS. HURST: We have dropped the request for Mr. Brim.

MR. KWUN: There is another witness from the Apache Foundation that they have named that was never disclosed in any prior Rule 26 disclosures.

THE COURT: Well, can't you work out a deal?

MR. KWUN: Your Honor, we disclosed this witness in July of 2011. We don't really feel the two situations are parallel.

THE COURT: Well, maybe they're not exactly parallel, but you did not use open source in your description, so there is something of an argument.

MR. KWUN: Your Honor, again, this was a Sun employee who -- whose entire field within the company was open source. He was the --

THE COURT: Yes. But you didn't say that is what you were going to call him as a witness on. You said you were going to call him on other things.

MR. KWUN: Your Honor, we disclosed him on Java, and he is not going to be talking about open source generally. He is going to be talking about open source as it relates to the Java platform.

THE COURT: Here is what I think you should do. It's not an order. It's just a suggestion, but I think when Mr. Phipps -- is that his name?

MR. KWUN: Yes, Your Honor.

THE COURT: Phipps or Phibbs.

MR. KWUN: Phipps.

THE COURT: Whenever he shows up, you get a two-hour deposition if you subpoena him and all that, but that's on the

condition that you help them take a two-hour deposition of the witness they want to take.

MS. HURST: That's fine with us, Your Honor. The other witness is their employee so it shouldn't be a problem.

THE COURT: Well, they don't need a deposition then. They can just interview him; right? Is there somebody you do want to take a deposition of?

MR. KWUN: Your Honor, we would have to confer on that. I think there is.

THE COURT: Well, you figure out somebody and let them know, but I believe -- I'm not ordering this. I'm just saying that I am a little sympathetic here to Oracle's problems.

MR. MULLEN: Reid Mullen for Google.

If I could just address the Court's question. I think there are several witnesses on their witness list who have never been disclosed under Rule 26.

THE COURT: Well, the normal rule is going to be they don't get to testify, period.

MR. MULLEN: That's fine with us.

THE COURT: But I can't say *never*. Conceivably you could be allowed, even at trial, to amend your -- to supplement your initial disclosures. But I regularly refuse to let people testify who were not disclosed under the initial disclosure rule, period.

MR. MULLEN: That's fine with us, Your Honor.

THE COURT: Well, I'm not saying that -- I have to go one by one and figure out what the right thing to do is, but if there is somebody you do want to depose, maybe you should take advantage of the opportunity.

MR. VAN NEST: We don't need that, Your Honor.

THE COURT: All right. Well, I -- then I'm just going to order you two hours. Mr. Phipps is going to sit for two hours to be deposed on this subject. Now it is an order. And you don't get anything in return.

What else can I help you with?

MS. SIMPSON: Do you have any other questions on Apache, Your Honor, or did you want to move on?

THE COURT: No. I think -- what are you going to say if Mr. Phipps comes in and says, *Oh, Google is right. The declaring lines of code were open to anybody. They just couldn't call themselves Java.* I mean, that would be a huge -- you would probably lose the case if that testimony comes in. I don't know. Maybe that's a broad statement, but that would be a dynamite thing.

I never heard that before. All I have heard are these complicated things that I can't -- like these emails, but if it's true that the open-source person at Java is going to come in and -- I mean, at Sun and say that anybody could take the headers, do their own implementation and call it somebody else like Android and that was perfectly okay, surely that's -- that

comes in for fair use.

MS. SIMPSON: Your Honor, I think we are conflating two things here. This spec license and the way that Apache went about implementing the Harmony project is not open source. All right? There is a separate open-source license, OpenJDK, and my understanding is that is what Mr. Phipps is familiar with and prepared to testify on. That's a separate licensing scheme than the spec license and the TCK. Two different licensing schemes that Sun uses to distribute its products.

THE COURT: Let me ask Mr. Paige.

Mr. Paige, a moment ago you said that he would testify that he could -- is it conditioned on there being some kind of a license? Mr. Phipps is going to say as long as you had some kind of a license, you could do that, what you were saying?

MR. KWUN: Your Honor, I can't vouch for precisely what he is going to say because he is a witness and we are going to have to ask him the questions at trial, but he is going to be the person who is knowledgeable about open-source practices at Sun with regard to Java. He is the person who would have worked with other people in the open-source community, including not just the OpenJDK users, but also people who worked on other open-source implementations.

THE COURT: One of the key questions is going to be could Apache do this at all without a license. Is he going to answer that question?

MR. KWUN: If he's asked that question, I am sure he will answer that question.

THE COURT: If he is going to -- he should know the facts so that he doesn't stumble over the facts and I -- all right.

See, to me, the way this was -- is coming across from Google right now is that the header lines of code for all 166 APIs could be completely copied and reused in somebody else's software as long as it was your own implementing code, and that was the custom and practice in the industry. You didn't need any license. You could just do it, period. That's what you're saying; right?

MR. PAIGE: That is certainly how the situation with Apache Harmony and GNU Classpath showed the practice and custom in the industry to be, yes. Absolutely. Mr. Schwartz said they could ship.

THE COURT: Well, that -- no. I don't want to tie this in to Mr. Schwartz and that comment that -- because there's other lines that you didn't read to me in the article. But what you're -- let me be clear. You're saying you didn't need any license at all. You didn't even need the click-through license. You didn't need anything. You could use those 166 APIs, the header lines only, do your own implementing code, and you were fine?

MR. PAIGE: That's right, Your Honor.

THE COURT: That's what you're saying?

MR. PAIGE: That's right.

THE COURT: And you're saying that was the custom and belief in the industry at the time?

MR. PAIGE: It's shown by -- with Harmony. They never told Harmony to stop doing this. They just said *you can't call it Java*.

THE COURT: Well, you know --

MR. PAIGE: Same with GNU Classpath.

THE COURT: I hope you got better proof than they just didn't stop them. I mean, that doesn't prove everything, that they didn't stop them. Is it their burden to go out and get an injunction?

MR. PAIGE: Not that they didn't stop them, Your Honor. They didn't even ask them to stop. They didn't say *Stop using the declaring code*. They just said *We're not going to let you to take the TCK license without a field-of-use restriction it*. They didn't say, *And, by the way, you're infringing our copyright. Please stop*. Never said. It was never said.

THE COURT: Well, all right.

So if there is testimony to that effect, Ms. Simpson, that would be pretty powerful, wouldn't it?

MS. SIMPSON: It would, Your Honor, but it's completely false. It's completely false. There is a licensing

scheme at Sun. Apache was following the licensing scheme.

The next step in the licensing scheme was to get the TCK, which they decided not to do which meant they no longer were licensed.

This is not a free-for-all. If the code were free to take from anyone, we wouldn't be here, Your Honor. That is not the way the licensing scheme at Sun works.

It's proprietary code. It can be distributed under various licensing schemes under Sun's and now Oracle's plans for those licenses. You can't come in and just take it. That's not how it works.

And Harmony was operating under that scheme. And while they were building the code, the expectation was they would follow the rules. At the end of the day, they decided they didn't want to follow the rules and then they shot the project down and acknowledged that the rules were in place and that they couldn't do what they wanted to do.

THE COURT: What do you say to the fact that Apache shut down the Harmony project and acknowledged that they didn't follow the rules?

MR. PAIGE: I don't think that's correct, Your Honor. They shut it down for sure because IBM, one of its backers, went over to OpenJDK. Oracle was another huge backer of Apache.

So with IBM and Oracle both working at OpenJDK, there

wasn't much for Apache Harmony to do anymore. The only person supporting it was Google.

THE COURT: All right. Is there anyone else like Mr. Phipps, a professor, for example, who will come in and say, *Yes, it was okay to copy the exact words of the headers and the 166 and that was the custom in the industry at the time as long as you didn't call yourself Java and as long as you didn't copy the implementing code*?

MR. KWUN: Your Honor, we also have another witness, Dr. Rick Katell. He is not a professor, but he is a Ph.D. He was a distinguished engineer at Sun for many years. He worked within the JavaSoft division, and he will offer testimony about his understanding as somebody who is an expert in the field about what was the understanding of computer scientists with regard to declaring code generally.

THE COURT: Has he been deposed?

MS. SIMPSON: No, Your Honor.

MR. KWUN: Due to medical issues, he has not yet been deposed, but the parties have agreed his deposition will go forward on Saturday the 30th.

MS. SIMPSON: Your Honor, that's a separate issue we wanted to raise. We wanted to reserve the right to make a motion after we deposed Mr. Katell since we hadn't had the opportunity to do so yet.

THE COURT: Well, I don't -- you want to raise a

motion. I don't get it.

MS. SIMPSON: Well --

THE COURT: You are already going to get a chance to depose the guy.

MS. SIMPSON: An additional motion in limine, should his testimony call for that once we have been able to depose him. We haven't been able to depose him all this time, even though he was disclosed back in December.

THE COURT: What is his medical issue, if I may ask?

MR. KWUN: He actually had a pair of medical issues.

THE COURT: Maybe you shouldn't say it on the public record, but how can he be here to testify at trial if he is so sick he can't testimony at deposition?

MR. KWUN: Your Honor, what happened -- and I have discussed with Dr. Katell what might be disclosed publically, so he is comfortable with this.

After he submitted his expert report, he had a medical diagnosis that required some surgery. Thereafter, he needed several weeks to recover on the recommendation of his doctor. So we agreed that his deposition would go forward late.

Two days before his deposition, he was admitted to the hospital again for an unrelated complication. That unrelated complication is what kept him from having his deposition taken, what would have been a late deposition, but agreed late deposition, and he is now at the point where he can have his

deposition -- sit for his deposition. He's still not fully recovered, but he is prepared mentally to have his deposition taken, and he is also prepared --

THE COURT: What is the best point he is going to make on this for you? For example, in his expert report, what is he going to say?

MR. KWUN: His expert report, which they have, by the way -- his expert report says that he is aware of instances where Sun reimplemented APIs of others, in particular, the SQL, the Structured Query Language, that IBM created for use in database for databases.

His particular field of expertise is in databases, so he will talk about that. He will talk about the use of the -- reasons why companies agreed to use common APIs, particularly again based on his experience working for Sun and negotiating agreements like this with other people in the industry, how that actually benefits society.

He will also talk about his understanding as a computer scientist of many, many years and a distinguished engineer at Sun of what was and was not allowed.

THE COURT: Is he going to say that it was allowed to copy all header lines in 166 APIs with no license whatsoever?

MR. KWUN: He is not -- his report does not speak specifically to the Java APIs. He speaks more generally about the understanding of computer scientists, about APIs generally.

THE COURT: I don't know. I'd have to -- okay. Thank you.

Any other witnesses that you have who will say that it was okay to copy the headers for all 166?

MR. KWUN: We will certainly have the testimony of people who were part of the Android team who will testify to their own beliefs at the time that they were implementing Android.

THE COURT: Give me an example of what their belief was.

MR. KWUN: Their belief -- for example, Mr. Rubin, who was the head of the Android project, will testify that he believed that this was fine.

THE COURT: What did he say last time?

MR. KWUN: I don't have his -- I couldn't tell you off the top of my head.

THE COURT: All right. I have a different question. What is the difference between Apache Harmony and GNU Classpath?

MS. SIMPSON: Your Honor, there is not a huge difference, other than the fact that, you know, GNU was -- there is not as a detailed history involved with GNU, but GNU was also a noncommercial entity who wanted to implement the code and they also have put their code aside --

THE COURT: Who is GNU to begin with?

MS. SIMPSON: Who is GNU to begin with?

THE COURT: What was the name of that entity?

MS. SIMPSON: That is the name of it, GNU.

THE COURT: What did that stand for?

MS. SIMPSON: I think we tried to answer that earlier in a prior conference. I don't know the answer to that question.

THE COURT: All right. But it was not Apache. It was a different group?

MS. SIMPSON: It was a different entity.

And, Your Honor, just as an example of how this is going to evolve into a whole line of testimony that is going to complicate matters, you know, GNU was a nonprofit entity. They were messing with the Java code. At one point, Sun learned that an entity in South Korea was going to use the GNU code to create a standard for that country and that would be a vast commercial use and Sun went out and shut it down.

So that is an example of how we're going to have to get into all of these other examples of things.

And I should add, Your Honor, that the law does not require Sun or Oracle to hunt down every person that is doing something that might be wrong with the code in essence. They're not required to do that.

As the Court said, I think it was in *Campbell*, they get to decide whether it's worth the candle to go after an infringer,

and so to the extent that these parties were even infringing, you know, that's something that we get to decide whether we want to go after them or not.

We're not going to go after potentially a nonprofit who is using code for educational purposes. That's a decision that the company can make. They can make that decision. They might go after a company that is going to use it for vastly commercial purposes.

Your Honor, I would just also add in response to something that was said earlier that Apache, when they shut down -- I can give you the cite. It's TX1045. And they said, "Java specifications are proprietary technology that must be licensed directly from the spec lead on whatever terms the spec lead chooses."

THE COURT: I'm sorry. I was back on GNU. What is it you are reading from?

MS. SIMPSON: This is an Apache trial exhibit. This is when they shut down Apache, they said, quote, Java specifications are proprietary technology that must be licensed directly from the spec lead on whatever terms the spec lead chooses.

Proprietary technology, it's not free for anyone to take, Your Honor. There is a licensing scheme. And it's interesting to hear that they're going to have a bunch of witnesses come in and testify about their beliefs as to what they could and could

not do. But those beliefs are contrary to the actual documents, the actual license agreements that governed. So I don't know how that can trump the license agreements that are in place, to have witnesses come in one after another --

THE COURT: No. I disagree. Let me give you the hypothetical. Let's say that you had these form documents, and notwithstanding the form documents that everyone signed, the well-known established custom was that the header lines could be copied.

Now, I'm not saying that that's going to be so clear. But if it was clear and a clearly-established custom, then notwithstanding what's in the documents, that custom would have to be taken into account in -- for example, in evaluating willfulness, because if everyone was doing it, like everyone on the freeway goes 65 miles an hour, not 55 miles an hour, or faster even, that's the custom and okay. Is it willful? I don't know. But you're charging them with willfulness, and if there was a custom, that would mitigate willfulness, even if it didn't technically comply with the agreement.

MS. SIMPSON: Two points --

MR. PAIGE: If I could --

THE COURT: I want to hear what Ms. Simpson says to that.

MS. SIMPSON: If it's willful, we are talking about Phase Two. None of this needs to come in for Phase One if we

are talking about relevance to willfulness.

A second point, a custom in the industry --

THE COURT: I did say earlier I'm not going to be that will strict on -- because I -- one of the problems with bifurcating is that people start to argue well, make them save that for part two.

But this is part of the story of the infringement of how they got the code to begin with, and Google is entitled to tell the story of how they got the code, and I'm saying I think this is clearly going to have to be a Phase One story.

MS. SIMPSON: I don't think that is relevant to Phase One. We have already decided copyrightability and infringement and so we're not talking about where they got the code anymore. We have already established that it's been copied, and the copy is an infringement unless it's fair use. So unless we can ping this into one of the particular factors --

THE COURT: There is the word *custom* in the *Wall Data* case.

MS. SIMSPON: Your Honor, that is dicta in the *Wall Data* case, and, frankly, it's being blown way out of proportion. That line in *Wall Data* is really intended to show that those are things you can consider when you are considering the four factors. The four factors are really what governs the of determination of whether something is fair or not.

And custom is -- *Wall Data* didn't apply custom. It

actually found that it wasn't part of the case. No other case has done that. We found one Eleventh Circuit case that talks about how that is an incorrect way to look the four factors. That you are really supposed to be looking at the four factors themselves and that that really is an informational piece, not a separate test.

I would also add, Your Honor, that a custom here is not what they're talking about. So we've got Apache where Sun insisted that they get a license and they said no and then they stopped. And then we've got GNU, which was a not-for-profit. When it was taken and used commercially, they were also stopped.

So if there is any practice here, it's shutting down people that are using things without -- outside of the license. So I don't know how we are establishing a custom that things were free for everyone to take.

MR. PAIGE: If I could just address what she is saying about Phase Two. They are saying that good faith/bad faith is part of the fair-use factors, so obviously if they're going to say we're in bad faith, we have to be able to show what Apache did and what Sun did with Apache. I mean, that's going to be part of the good faith/bad faith story.

As to GNU Classpath, it is basically the same as Apache Harmony. They are reimplementing. The big difference is that GNU Classpath started in 1998, seven years before Apache. And

I think I heard her say that GNU Classpath has shut down. That's not true. GNU Classpath continues to this day.

So, you know, the only thing that GNU Classpath adds is that it's actually a longer time period in which Sun has not said *you can't use the declaring code*. There is not a scrap of paper in the --

THE COURT: Well --

MR. PAIGE: -- in the discovery, in the evidence that says *you are infringing by using our declaring code*. They say *we won't give you a TCK license*. They do not say *you are infringing by using our declaring code* --

THE COURT: Well, who has downloaded the GNU to -- who in the real world has ever used what GNU has put out there? Anybody?

MR. PAIGE: I believe there might have been some use by Oracle itself before OpenJDK came around, but I don't know that for a fact.

THE COURT: So what is it exactly that GNU did with the 166 headers?

MR. PAIGE: The same thing Apache Harmony did. It takes the headers and writes its own implementing code so it can reimplement the APIs.

THE COURT: What's its product called?

MR. PAIGE: GNU Classpath. The GNU Classpath Project.

THE COURT: And anyone can go download that?

MR. PAIGE: Yes.

THE COURT: Without license?

MR. PAIGE: I believed it's licensed under the GPLv2+Classpath exception. I think that's where the Classpath exception comes from, in fact.

THE COURT: That's a Java license?

MR. PAIGE: It's a Free Software Foundation license, the GNU Public General License.

THE COURT: And what license does GNU have from Oracle or Sun?

MR. PAIGE: I don't know that they have any license from Oracle or Sun, Your Honor.

THE COURT: Any license?

MS. SIMPSON: They don't have a license, Your Honor. I mean they took the spec license to download the code, but they don't have the TCK license.

MR. PAIGE: I don't think there is any evidence of that.

THE COURT: Mr. Paige's point is that all these years have gone by and Sun and Oracle have never complained to GNU Classpath; is that true?

MS. SIMPSON: Your Honor, I don't know if there was never any complaining, but the fact of the matter is it's a nonprofit entity and no one is using the code, so it isn't worth -- I think the companies made the decision that it's not

worth fighting with them when no one is actively using the code.

MR. PAIGE: Two points, Your Honor.

Again, there isn't a scrap of paper in discovery that says anything about going to GNU or going to Apache and saying you are infringing by using the declarations. It's just not there. They can't point it to it.

Second, in the same document where they were stipulating as to Apache not having a license, they stipulated that GNU never took a license from Sun. So, again, this idea they took the specification license --

THE COURT: But Ms. Simpson's point on that is they didn't get past the TCK so that's why they didn't have a license.

It would be interesting if you can come up with -- you should have somewhere in your files where they click through it at Apache, where they clicked through. Surely Sun has a record of that.

MS. SIMPSON: I don't know if they do or not, Your Honor.

THE COURT: So are you briefing this point about custom in the briefing that's under way in connection with the instructions?

MS. SIMPSON: Yes, Your Honor.

THE COURT: Are you briefing that, too?

MR. BABER: Yes, we are, Your Honor.

MS. SIMPSON: It was actually, I think, already in our jury instruction brief that was submitted last Wednesday. But we will revisit it in the next filing as well, I'm sure.

THE COURT: You mean in addition to your trial brief, you've got a brief on jury instructions?

MS. SIMPSON: Your Honor, your rules required a brief.

THE COURT: Oh, did they? Okay.

MS. SIMPSON: Yes.

THE COURT: There are so many briefs. All right. I don't know the answer to this.

MS. SIMPSON: Your Honor, I would say if we are going down a path where some of this evidence is going to come in, we would ask for a pre-instruction, and I don't think that would remedy the situation, but I think that some kind of instruction that informed the jury that there is no license here would be --

THE COURT: Well, I will be happy to say, off the top of my head because I know this by heart -- just to say to the jury You're going to hear evidence now about Apache and Harmony and you should know that Apache -- that Google could get no greater rights by way of license from Apache than Apache had to begin with from Sun. I believe that's a correct statement of the law.

MR. PAIGE: That's right, Your Honor.

THE COURT: So --

MS. SIMPSON: I don't --

THE COURT: Let me raise a different point. I am thinking about giving both sides some time during the -- additional time, maybe -- maybe we could start out at 20 minutes per side, but use five minutes here, seven minutes there, to explain things to the jury after the evidence is under way. For example, once in a patent case or some kind of a case, we had a witness get on the stand, and he spent 55 minutes going through invoices. And after three minutes, I could tell the jury was completely lost.

So I interrupted after about 15 minutes of this. I said, *Tell the jury why we're doing this.* It took one minute or less, and then it became clear that this was a setup for a foundational thing for some expert who was coming later so that the jury would now understand that these were going to be the lost profits or something.

So maybe we ought to have some flexibility to let you make non-argumentive statements to the jury now and then that helps them understand why they're about to hear a witness, or I may just interrupt in the middle and say *please explain to the jury why we are even hearing this witness.* In fact, I'm just going to do this. You don't need to tell me *yes* or *no*. You just have to be ready.

I may call upon you -- I will try to give you both equal

time. If one side makes a small speech, I will always give the other side an opportunity right then and there to make the same speech going the other way. But it helps the jury follow the evidence.

In that regard, can we come up with a list of the top, say, dozen or 20 actors in the case? And just have a one-page handout that -- and then maybe on the other side, a glossary of terms of the top 12 to 20 terms? So the jury could look on the back side and see, *Oh, Classpath exception, here is what that means*. Or can you think about that.

MR. BICKS: I can say, Your Honor, you did that last time, and I actually was looking at that document. I think it's helpful.

THE COURT: Let's do that again. You have to adjust it for this trial.

I have run out of steam on Apache. I don't have an answer for you.

MS. SIMPSON: Thank you, Your Honor.

MR. PAIGE: Thank you, Your Honor.

THE COURT: Anything else you want to take up? What time is? Almost 11:00. Any other pretrial issues you want to --

MR. VAN NEST: Nothing for Google, Your Honor. We are all set.

THE COURT: How about for Oracle?

MR. BICKS: I was going to say, Your Honor, one question you asked at one point, you know, what would be helpful to know about before the openings. Obviously the whole OpenJDK issue, you know, in terms of shaping things is going to be key.

And then the -- one of the concerns I have is this: Obviously the Court knows our position on bifurcation, so I won't repeat that. But the concern I have is essentially telling a jury that you don't have to get to the damages stuff if you decide what Google has done is fair use, and I'm just concerned about that. I know it's kind of between a rock and a hard place.

THE COURT: I realize -- that's a good point, but I think it's an overblown concern. In the cases where I've done this in the past, I think the juries have been extremely conscientious, and I have not detected any willingness on their part to give short shrift to the plaintiff just because they could get out of some work.

I don't think that's -- and I would give -- I wouldn't repeat it over and over again, but I would say things, you know, that I know the jury would not do such a thing and that they will make a fair determination on part one.

Once the jury gets into it, that will not be -- they are going to want to do the right thing, whatever they think is the right thing. I don't think you should worry about that.

MR. BICKS: Understood.

THE COURT: Anything else I can help you with?

MR. BICKS: No. We appreciate the Court's time.

THE COURT: OpenJDK, that is something that you would like to know the answer to. And I forgot.

On your side, what is it you want to know the answer to?

MR. VAN NEST: Apache, Your Honor, what we've just been talking about.

MS. HURST: We have one other issue, Your Honor.

THE COURT: All right. Please.

MS. HURST: On the expert report schedule as we stipulated that the Court ordered, there were three rounds of reports, Your Honor, and to take an example, there were technical experts on our side who served an opening round report on matters on which we did not bear the burden of proof on fair-use-related issues. Then they served a second round responsive to Google's fair use technical analysis, Your Honor.

It would seem that those -- since those were both part of our response to Google's case, that during the direct examination of those witnesses, we would be permitted to cover anything in either of those reports since it was in the posture of disclosures responsive to Google's case and we'll be going second, but I wanted to see if that's within the scope of what the Court had in mind.

THE COURT: What do you say over there? I don't --

I'm not saying *yes* or *no* because I don't know the -- yes?

MS. ANDERSON: Yes, Your Honor. This is a fairly complicated issue to raise sort of all of a sudden. We didn't know this was going to be raised today.

The parties did agree and the Court entered a schedule for these reports and it was laid out what could be part of replies and rebuttals, and it was quite specific and not exactly the default rule.

And so if there's a specific issue, I know that there were some things raised in some of the later reports from Oracle that may not be proper under the agreements, but I didn't realize that Oracle was raising that today, and I think we need to disentangle that a little bit if there is something that Oracle is concerned about that they are trying to get in that wasn't permitted under that schedule.

THE COURT: All right. I think it's witness by witness, and I don't want to give a blanket rule on this. So let's -- I don't want to rule one way or the other on that right now.

MS. ANDERSON: Thank you, Your Honor.

MS. HURST: Thank you, Your Honor.

We did offer the stipulation to just consolidate everything on both sides, Your Honor. I don't know what the holdup is to agreeing to that, but we did offer that stipulation and so I thought it was fair game.

THE COURT: All right. No. It's good to raise, but I have seen situations where somebody tries to slip stuff in in a reply report where it should have been raised in the initial report, and it's not true reply, and I'm not saying that occurred here, but then they -- so --

MS. ANDERSON: Thank you, Your Honor.

THE COURT: Sometimes I've made the expert come back twice. They get to go over what they did in their initial report. Then they got to wait until the opposition testifies. Sometimes the opposition gives up on everything but one issue. And then they get to reply only on that one issue. It's like within the scope of the cross-type thing, and they don't get to lard in in their initial direct everything that was covered in the reply. That might apply here. I don't know. We have to -- but we'll sort that out as the witnesses come.

MS. HURST: Thank you, Your Honor.

MS. ANDERSON: Thank you.

THE COURT: I hate to let you all go because it's so much fun having you here.

Let's just say on your one-page summary motions, I've asked you to brief some of them, but -- and I've read them all. But the burden is on you to bring them up at the right time so that I can -- and the right time may be the morning that the witness is going to appear. It could be the afternoon before. You have to use a rule of reason, but the burden is on you to

bring it up and maybe let the other side know that you're going to bring it up. All right. I guess we're done for now.

MR. VAN NEST: Thank you, Your Honor.

THE COURT: All right. Thank you. See you -- good luck to both sides.

Oh, the odds are 95 percent or better that we will go on schedule. I believe that criminal case will be out of the way in time. There is a tiny percent chance that the jury would be deliberating that morning. I don't think so. I think it will be done and the decks are clear for your case. All right.

(Proceedings adjourned at 11:00 a.m.)

CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

DATE: Friday, April 29, 2016

Pamela A. Batalo

Pamela A. Batalo, CSR No. 3593, RMR, FCRR
U.S. Court Reporter